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45
No. 15583

United States
Court of Appeals
for the Ninth Circuit

See Vol.
3044

ALEX E. WILSON,

Appellant,

VS.

FRED G. STEVENOT, Trustee of Coastal Ply-
wood & Timber Co., debtor, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Northern Division

FILED

AUG - 9 1957

PAUL P. O'BRIEN, CLERK



No. 15583

United States
Court of Appeals
for the Ninth Circuit

ALEX E. WILSON,

Appellant,

vs.

FRED G. STEVENOT, Trustee of Coastal Ply-
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit of Donald W. McMurchie in Support of Motion for Further Consideration.....	78
Affidavit of Trustee in Opposition to Petition for Allowance of Real Estate Broker's Com- mission	39
Appeal:	
Certificate of Clerk to Transcript of Record on	111
Designations of Record on (DC).....	108, 110
Notice of	103
Statement of Points on (DC).....	103
Statement of Points on Appeal and Designa- tion of Record on (USCA).....	427
Certificate of Clerk to Transcript of Record...	111
Designation of Record on Appeal (DC)....	108, 110
Designation of Record on Appeal (USCA)....	427
Findings of Fact and Conclusions of Law:	
Proposed by Trustee.....	55
Proposed by Petitioner.....	66
Findings of Fact, Conclusions of Law and Order Denying Claim of Alex E. Wilson....	89

Transcript of Proceedings—(Continued):

Exhibits for Petitioner—(Continued):

17—Telegram, June 26, 1953, Wilson to Stevenot	389
---	-----

Exhibit for Trustee:

A—Letter, July 9, 1952, Wilson to Stevenot	298
Opening Statement by Mr. McMurchie.....	114
Opening Statement by Mr. Olson.....	119

Witnesses:

Holm, Fred

—direct (McMurchie)	224
—cross (Olson)	231
—cross (Dudley)	237

Steinberg, William

—direct (McMurchie)	152
—cross (Olson)	181, 191
—redirect (Hildebrand)	213
—recross (Olson)	222

Stevenot, Fred G.

—direct (Hildebrand)	344, 390
—direct (Olson)	395
—cross (Hildebrand)	414

Wilson, Alex E.

—direct (McMurchie)	132, 246
—cross (Olson)	292
—cross (Dudley)	338
—recalled, direct (Olson).....	419

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In the United States District Court, Northern
District of California, Northern Division

No. 12223

In the Matter of
COASTAL PLYWOOD & TIMBER COMPANY,
a corporation, Debtor.

In Proceedings for the Reorganization of a Corporation

PETITION OF TRUSTEE FOR AUTHORITY
TO SELL CONTRACTS OF THE DEBTOR

To the Honorable Dal M. Lemmon, Judge of the
District Court of the United States for the
Northern District of California, Northern Division:

The Petition of Fred G. Stevenot as Trustee
herein respectfully shows that:

1. Your petitioner is the duly appointed, qualified and acting Trustee of the Estate of Coastal Plywood & Timber Company, a corporation, Debtor in the above entitled cause.

2. The Order appointing your petitioner Trustee of the Debtor herein, among other things, authorizes and directs your petitioner, as such Trustee, to conduct and operate the business of the Debtor and to manage, maintain and keep in proper condition

and repair the assets, properties and business of the Debtor until further order of the Court.

3. Among the assets of the Debtor are the following described contracts:

(a) Agreement dated September 4, 1946, by and between Rankin P. Rickard, Marjorie Rickard, Wesley P. Rickard, Vina M. Rickard, Wesley L. Rickard and Grace H. Rickard, as Sellers, and H. C. Crofoot, Trustee for Coastal Plywood Corp., as Buyer, together with two supplements thereto.

(b) Agreement dated September 4, 1946, by and between Stanley E. and Delia Brush, as Sellers, and H. C. Crofoot, Trustee for Coastal Plywood Corp. as Buyer, together with three supplements thereto,

(c) Agreement dated September 4, 1946, by and between Pauline Brush, as Seller, and H. C. Crofoot, Trustee for Coastal Plywood Corp., as Buyer, together with two supplements thereto.

(d) Agreement dated September 5, 1946, by and between George E. Rummel, as Seller, and H. C. Crofoot, Trustee for Coastal Plywood Corp., as Buyer, with three supplements thereto.

By each of said contracts described in subparagraphs (a) and (d) above, the Sellers therein named sold to the Buyer the merchantable redwood, fir and sugar pine standing and growing upon certain described real properties situated in the County of Mendocino, State of California, for a purchase price to be computed at the rate of Two Dollars (\$2) per

thousand feet of such timber. Each of said contracts provides that any timber not removed within ten years from the date of execution thereof shall revert to and become the property of the respective Sellers.

By each of said contracts described in subparagraphs (b) and (c) above, the Sellers therein named agreed to sell to the Buyer certain described parcels of real properties situated in the County of Mendocino, State of California, for a purchase price to be computed at the rate of Two Dollars (\$2) per thousand feet of merchantable redwood, fir and sugar pine growing thereon.

Said contracts described in subparagraphs (a) and (d) require the Buyer to pay all taxes levied and assessed against the growing timber for a period of ten years, and said contracts described in subparagraphs (b) and (c) require the Buyer to pay all taxes levied or assessed against the property therein agreed to be conveyed which may be due and payable from and after the date thereof. The contracts described in subparagraphs (b) and (d), as supplemented, also provide for annual payments to the Sellers of \$1000 and \$500, respectively, commencing September 4, 1948 and continuing until logging operations are commenced.

By an Assignment dated December 6, 1946, H. C. Crofoot, the Buyer named in the original agreements, assigned all of his right, title and interest in and to said agreements to Coastal Plywood Cor-

poration, which thereafter was merged with and into the Debtor.

4. At the time of the execution of the original agreements, Coastal Plywood Corporation paid an aggregate of \$30,040 on the purchase prices provided for therein. In addition, the Debtor has made annual payments to the Sellers named in the contracts described in subparagraphs (b) and (d) of paragraph 3 aggregating \$7500, and Coastal Plywood Corporation and the Debtor have paid property taxes as required by said agreements.

5. Your petitioner is of the opinion, as such Trustee, that the above described contracts should be sold, if a reasonable price can be obtained therefor, for the following reasons:

(a) Each of said contracts described in subparagraphs (a) and (d) of paragraph 3 provide that any timber not removed within ten years from the date thereof shall revert to the Sellers. In this connection, the contract described in said subparagraph (a) involves substantially more timber than the other three contracts combined. In view of the problems hereinafter noted and in view of the Debtor's financial condition, your petitioner is of the opinion, as such Trustee, that there is serious doubt that the Debtor will be able to remove such timber prior to the expiration of such contracts in 1956.

(b) The timber conveyed, or growing on land agreed to be conveyed in said contracts, can be

economically removed to the Debtor's mill only over a parcel of land known as the "Y-Ranch." A question has been raised as to the right of the Debtor to remove timber over said land and also as to the interpretation of the Debtor's duties under said contracts, the resolution of which could involve protracted litigation.

(c) The proceeds of a sale of said contracts would provide funds needed in the current operations of the Debtor.

6. During the past few months, your petitioner, as Trustee, has endeavored to find a purchaser for said contracts. On August 19, 1952, your petitioner received from Clarence L. Nielson of Santa Cruz, California, an offer to purchase said contracts for the sum of \$100,000, conditional upon the ability of said Clarence L. Nielson to successfully negotiate revised agreements with the Sellers named therein. In order to induce Clarence L. Nielson to incur the expense incident to such negotiation, your petitioner accepted said offer and granted to Clarence L. Nielson a 60-day option to purchase said contracts for said price, subject, however, to the approval of this Court.

Your petitioner is informed and believes that Clarence L. Nielson was unsuccessful in his efforts to negotiate revised agreements with said Sellers. Nevertheless, your petitioner was advised by Clarence L. Nielson that he and his wife were prepared to purchase said contracts for the sum of \$100,000, less the sum of \$5,000 to be paid to A. W. Wilson

as a real estate commission when and if the transaction is consummated, and there was submitted to your petitioner a form of letter agreement covering such purchase. On October 11, 1952, your petitioner, as Trustee, confirmed and approved said letter agreement and agreed to submit the offer of Clarence L. and Amy K. Nielson to this Honorable Court.

A true and correct copy of said letter agreement with Clarence L. and Amy K. Nielson is attached hereto as Exhibit 1 and by reference hereby made a part hereof. As appears from said letter agreement, Clarence L. and Amy K. Nielson have deposited the sum of \$100,000 in escrow, to be delivered to your petitioner upon the execution and delivery of an assignment to them, in the form attached thereto as Exhibit B thereof, of all of the right, title and interest of the Debtor in and to said contracts and upon the receipt of a final order of this Honorable Court approving said letter agreement and authorizing the execution of said assignment.

7. Your petitioner is of the opinion, as such Trustee, that it is to the best interests of the Debtor, the Debtor's Estate and the creditors and stockholders thereof, that said contracts be sold. Your petitioner is of the further opinion, as such Trustee, that the offer of Clarence L. and Amy K. Nielson is fair and reasonable and should be accepted.

Wherefore, your petitioner prays that an Order be made and entered herein:

1. Approving the letter agreement dated October 11, 1952, with Clarence L. Nielson and Amy K. Nielson, attached as Exhibit 1 hereof;

2. Authorizing your petitioner, as Trustee, to execute an assignment of all of the right, title and interest of the Debtor in and to the contracts described in paragraph 3 hereof to Clarence L. and Amy K. Nielson, in the form attached as Exhibit B to said letter agreement;

3. Authorizing the payment of the sum of \$5,000 to A. W. Wilson as a commission on said transaction;

4. Instructing your petitioner with respect thereto; and

5. Fixing the time and place of hearing on this Petition and directing the giving of notice thereof.

Dated: October 15, 1952.

/s/ FRED G. STEVENOT,
Trustee.

Duly Verified.

EXHIBIT No. 1

Mr. Fred G. Stevenot, Trustee,
Coastal Plywood & Timber Company,

Debtor, United States District Court for the Northern District of California, Northern Division,
No. 12223.

Dear Mr. Stevenot:

Subject to the terms and conditions hereinafter set forth, the undersigned hereby agree to purchase all of the right, title and interest of Coastal Plywood & Timber Company in and to the following described contracts:

(a) Agreement dated September 4, 1946, by and between Rankin P. Rickard, Marjorie Rickard, Wesley P. Rickard, Vina M. Rickard, Wesley L. Rickard and Grace H. Rickard, as Sellers, and H. C. Crofoot, Trustee for Coastal Plywood Corp., as Buyer, together with two supplements thereto.

(b) Agreement dated September 4, 1946, by and between Stanley E. and Delia Brush, as Sellers, and H. C. Crofoot, Trustee for Coastal Plywood Corp. as Buyer, together with three supplements thereto.

(c) Agreement dated September 4, 1946, by and between Pauline Brush, as Seller, and H. C. Crofoot, Trustee for Coastal Plywood Corp., as Buyer, together with two supplements thereto.

(d). Agreement dated September 5, 1946, by and between Stanley E. and Delia Brush, as Sellers, and Crofoot, Trustee for Coastal Plywood Corp., as Buyer, with three supplements thereto.

The undersigned acknowledge receipt of true copies of each of the above agreements and supplements thereto and further acknowledge that they have duly familiarized themselves with the terms and conditions thereof.

The terms and conditions upon which the under-

signed agree to purchase said contracts are as follows:

1. The purchase price to be paid by the undersigned is the sum of \$100,000, subject to a real estate commission of \$5,000 to be paid by Coastal Plywood & Timber Company to A. W. Wilson, Realtor, but only upon completion of this transaction and the receipt of such purchase price by Coastal Plywood & Timber Company. For the purpose of insuring payment of said purchase price the undersigned has deposited with Bank of America National Trust and Savings Association, 300 Montgomery Street, San Francisco, California, in escrow, the sum of \$100,000 with escrow instructions in the form attached as Exhibit A to this letter agreement.

2. This letter agreement is subject to final order of approval of the United States District Court for the Northern District of California in the proceedings for reorganization of Coastal Plywood & Timber Company above mentioned. You agree to make prompt application for such final order and upon such final order being entered by the Judge of said Court, and becoming final, this agreement shall become binding as an agreement of purchase and sale in accordance with its terms.

3. When this agreement shall have become binding as an agreement for purchase and sale as above provided, you will execute and deliver to the undersigned an assignment, in form annexed hereto as Exhibit B, which is incorporated herein by refer-

ence and made a part hereof, and you will thereupon be entitled to withdraw from Bank of America National Trust and Savings Association the said sum of \$100,000. At the option of the undersigned, this agreement may be terminated and the undersigned be released from all liability hereunder and shall be entitled to withdraw said sum of \$100,000 from said escrow unless an order has been entered by the Judge of the above entitled court and has become final on or before December 15, 1952.

If the foregoing is satisfactory to you, please indicate your acceptance in the appropriate space below.

Dated: San Francisco, California, October 11th, 1952.

CLARENCE L. NIELSON,
AMY K. NIELSON.

Confirmed and Approved:

FRED G. STEVENOT,
Trustee, Coastal Plywood &
Timber Company.

EXHIBIT A
ESCROW INSTRUCTIONS

To: Bank of America National Trust
& Savings Association
300 Montgomery Street
San Francisco 20, California

In Escrow, we deposit with you the sum of \$100,000 which you are authorized to pay to Fred G.

Stevenot, Trustee of Coastal Plywood & Timber Company, when you shall have received and hold for the account of the undersigned the following:

(a) Certified copy of a final Order of the United States District Court for the Northern District of California, Northern Division, in a cause entitled "In the Matter of Coastal Plywood & Timber Company, a corporation, Debtor, in Proceedings for the Reorganization of a Corporation," No. 12223, approving that certain letter agreement of even date herewith between Fred G. Stevenot, as Trustee of said Debtor, and the undersigned, and authorizing the execution of the assignment referred to in subparagraph (b) hereof;

(b) Assignment in the form attached to the above-mentioned letter agreement as Exhibit B thereto, duly executed by Fred G. Stevenot.

On payment of said sum to Fred G. Stevenot, you will deliver the documents above-mentioned in subparagraphs (a) and (b) hereof to the undersigned, provided that if said documents have not been received by you by December 15, 1952, you shall at any time thereafter before said documents are received by you, upon written demand of the undersigned, pay over to the undersigned said sum of \$100,000.

Dated: San Francisco, California, October 11th, 1952.

CLARENCE L. NIELSON
AMY K. NIELSON

Bank of America National Trust and Savings

Association acknowledges receipt of the sum of \$100,000 from Clarence L. Nielson and Amy K. Nielson, to be held subject to the foregoing instructions and also subject to all of the terms and conditions of the undersigned's escrow instructions which are incorporated herein by reference and made a part hereof.

Dated: San Francisco, California, October 11, 1952.

Bank of America National Trust and
Savings Association

/s/ By W. C. KOENIG,
Authorized Officer.

EXHIBIT B

Know All Men By These Presents:

That the undersigned Fred G. Stevenot, as Trustee of Coastal Plywood & Timber Company, Debtor in proceedings for reorganization of said Company, now pending before the United States District Court for the Northern District of California, Northern Division, No. 12223 (and not individually), for good and valuable consideration, the receipt whereof is hereby acknowledged, hereby quits, claims, sells, assigns, transfers and sets over unto Clarence L. Nielson and Amy K. Nielson, their heirs, successors and assigns, all of the right, title and interest of Coastal Plywood & Timber Company in and to the following described contracts, to-wit:

(a) Agreement dated September 4, 1946, by and

between Rankin P. Rickard, Marjorie Rickard, Wesley P. Rickard, Vina M. Rickard, Wesley L. Rickard and Grace H. Rickard, as Sellers, and H. C. Crofoot, Trustee for Coastal Plywood Corp., as Buyer, together with two supplements thereto.

(b) Agreement dated September 4, 1946, by and between Stanley E. and Delia Brush, as Sellers, and H. C. Crofoot, Trustee for Coastal Plywood Corp. as Buyer, together with three supplements thereto.

(c) Agreement dated September 4, 1946, by and between Pauline Brush, as Seller, and H. C. Crofoot, Trustee for Coastal Plywood Corp., as Buyer, together with two supplements thereto.

(d) Agreement dated September 5, 1946, by and between George E. Remmel, as Seller, and H. C. Crofoot, Trustee for Coastal Plywood Corp., as Buyer, with three supplements thereto.

This assignment is made without representation or warranty and free of any equity, except that the undersigned, as such Trustee (and not individually) represents and warrants that the following payments required by the above-described contracts to be made have been made:

(1) All property taxes levied and assessed against the growing timber or other property agreed to be sold in said contracts, up to and including the second installment of 1951-1952 taxes due January 20, 1952.

(2) Annual payments of \$1000 to Stanley E. and

Delia Brush payable pursuant to supplemental agreement dated December 10, 1947, between Stanley E. and Delia Brush and Coastal Plywood Corporation, on September 4, 1948, 1949, 1950, 1951 and 1952.

(3) Annual payments of \$500 to George E. Remmel payable pursuant to supplemental agreement dated December 10, 1947, between George E. Remmel and Coastal Plywood Corporation, on September 4, 1948, 1949, 1950, 1951 and 1952.

The above named assignees by their acceptance of this assignment hereby assume all obligations of Coastal Plywood & Timber Company under said contracts from the date of this assignment and agree to hold Coastal Plywood & Timber Company, its officers, directors, stockholders and creditors and the undersigned, as Trustee, free and harmless of and from any and all liability of whatsoever kind or character accruing or accrued to any person whatsoever by reason of any action or failure to take action, including failure to perform, of said assignees pursuant to or in attempted enforcement of any of the above described contracts or the supplements thereto or otherwise, or by reason of the conduct of any agents, employees, assignees, successors or invitees of said assignees or by reason of any conduct permitted by said assignees; provided that said assignees do not assume any liability for any claims arising out of or in connection with any action taken by Coastal Plywood & Timber Company or any other events occurring prior to this assignment.

In Witness Whereof, the undersigned has executed this assignment pursuant to and in conformity with an Order of the above-entitled court duly made and entered in the above-entitled proceeding the day of, 1952.

Dated: San Francisco, California, 1952.

.....

FRED G. STEVENOT,

Trustee of Coastal Plywood &
Timber Company.

[Endorsed]: Filed Oct. 16, 1952.

[Title of District Court and Cause.]

**ORDER AUTHORIZING TRUSTEE TO SELL
AND ASSIGN CERTAIN CONTRACTS OF
THE DEBTOR**

At a Court of Bankruptcy, held in and for the Northern District of California, Northern Division, at Sacramento, on the 12th day of November, 1952, before Honorable Dal M. Lemmon, Judge of the United States District Court for the Northern District of California, Northern Division.

This cause having come on regularly to be heard on the 3rd day of November, 1952, pursuant to an Order entered herein on October 16, 1952; and notice of said hearing having been given to all known creditors and stockholders of the Debtor herein by mail and publication in the manner required by said Order; and the Court having read and considered the Petition of the Trustee, dated October 15,

1952, for authority to sell certain contracts of the Debtor; and all parties interested having been heard,

It Is Hereby Ordered:

1. That the letter agreement dated October 11, 1952, by and between Fred G. Stevenot, as Trustee herein, and Clarence L. Nielson and Amy K. Nielson, providing for the purchase by said Clarence L. Nielson and Amy K. Nielson of certain contracts of the Debtor, be and the same is hereby approved in the form attached as Exhibit 1 to said Petition of the Trustee dated October 15, 1952.

2. That Fred G. Stevenot, as Trustee herein, be and he is hereby authorized, on behalf of the Debtor, to execute an assignment of all of the right, title and interest of the Debtor in and to said contracts to said Clarence L. Nielson and Amy K. Nielson, in the form attached to said letter agreement as Exhibit B thereto, and to deliver said assignment to or for the account of Clarence L. Nielson and Amy K. Nielson upon the receipt for the account of the Debtor of the sum of \$100,000, representing the full purchase price for said contracts.

3. That Fred G. Stevenot, as Trustee herein, be and he is hereby authorized to pay to A. W. Wilson, from said sum of \$100,000, a commission on said transaction in the amount of \$5,000.

Dated this 12th day of November, 1952.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed Nov. 12, 1952.

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF REAL
ESTATE BROKERS COMMISSION

To the Honorable Judge of the United States District Court for the Northern District of California, Northern Division:

The Petition of Alex E. Wilson respectfully represents:

1. That your Petitioner is a duly licensed real estate broker in the State of California, and makes this Petition for the allowance of a real estate brokers commission or for reasonable compensation for services rendered, in procuring J. J. Sugarman Co. and Sugarman Lumber Company as the purchaser of the assets of Coastal Plywood & Timber Company, the debtor corporation in the above entitled reorganization proceedings.

2. That Fred G. Stevenot is the duly appointed and acting Trustee of Coastal Plywood & Timber Company, the above named debtor corporation.

3. That during the month of August, 1952, your Petitioner first contacted Fred G. Stevenot, Trustee, and discussed with said Trustee the properties of Coastal Plywood & Timber Company. Your Petitioner was informed that said debtor corporation desired to sell all of its rights, title and interest in and to certain contracts and agreements and that it then desired to sell all of the balance of its assets

in one transaction to one purchaser. That your Petitioner was instructed by Fred G. Stevenot to proceed with the sale of the right, title and interest of said debtor corporation in and to certain contracts and agreements first, and then to proceed with the sale of all of the other assets of said corporation.

4. That your Petitioner immediately contacted most of the large and financially responsible corporations, firms and individuals engaged in the purchase and sale of timber and lumber on the West Coast, and finally contacted a certain Clarence L. Nielson and Amy K. Nielson who on October 11, 1952, submitted to said Trustee, Fred G. Stevenot, their offer to purchase all of the right, title, and interest of Coastal Plywood & Timber Company, the debtor corporation, in and to certain contracts and agreements for the sum of One Hundred Thousand and 00/100 (\$100,000.00) Dollars.

5. That on or about November 12, 1952, the above entitled Court approved the assignment of all of the right, title, and interest of Coastal Plywood & Timber Company in and to certain contracts and agreements to said purchasers, Clarence L. Nielson and Amy K. Nielson, and the above entitled Court authorized Coastal Plywood & Timber Company to pay Alex E. Wilson a real estate brokers commission in the sum of Five Thousand and 00/100 (\$5,000.00) Dollars. That said real estate brokers commission was subsequently paid by Coastal Plywood & Timber Company to your Petitioner.

6. That your Petitioner continued his negotiations for the sale of all of the other assets of Coastal Plywood & Timber Company, and devoted his time and attention for a period of more than eight months exclusively to the task of obtaining a purchaser for the balance of the assets of Coastal Plywood & Timber Company. That during this time your Petitioner personally contacted most of the larger lumber concerns in California, Oregon, and Washington, who were capable of handling a transaction of this size, and personally expended considerable money in travel and other expenses during these negotiations. That your Petitioner placed advertisements in various newspapers, carried on extensive correspondence, and personally discussed the purchase of the assets of Coastal Plywood & Timber Company with many persons and firms in an effort to obtain a purchaser for these assets.

7. That during all of this time your Petitioner was continually in contact with Fred G. Stevenot, Trustee for the debtor corporation, in regard to the work he was doing and the persons and firms to whom he had submitted proposals for the purchase of these assets. That various conversations were held in the offices of Fred G. Stevenot and various letters were written to Fred G. Stevenot as Trustee setting forth the efforts being made by your Petitioner, lists of the various firms to which proposals for the purchases of these assets were submitted and the reactions of these firms to these proposals. That Fred G. Stevenot as Trustee was aware of and acquiesced in the aforesaid services rendered by

your Petitioner and cooperated with and encouraged your Petitioner in every way, and provided your Petitioner with the information required in these negotiations together with copies of financial reports, cruises, property maps and inventories for submission to interested parties.

8. That during this period a First Plan of Reorganization of the above named corporation was pending before this Court which plan proposed the continuation of the business of Coastal Plywood & Timber Company in the reorganization proceedings. That this plan of reorganization was not acceptable to the Bank of America, National Trust and Savings Association, or to the Reconstruction Finance Corporation who insisted that any plan of reorganization contain a provision for payment of a substantial portion of the indebtedness due to these creditors. That the objection of these creditors to the First Plan of Reorganization made a sale of the assets of Coastal Plywood & Timber Company imperative if the forced sale of the assets of this corporation in bankruptcy with the resulting loss to creditors and stockholders was to be avoided.

9. That during the month of April, 1953, your Petitioner submitted to William Steinberg, Attorney for J. J. Sugarman Company of Los Angeles, California, N. N. Sugarman and Barney Margolis, a proposal for the purchase of all of the assets of Coastal Plywood & Timber Company. That your Petitioner was thereafter in continual contact with

William Steinberg, both by telephone and by conference, and your Petitioner provided said William Steinberg with information and documents necessary to assist his clients in formulating a proposal to be submitted to Fred G. Stevenot, Trustee of the debtor corporation for the purchase of the assets of Coastal Plywood & Timber Company.

10. That Fred G. Stevenot, as Trustee of Coastal Plywood & Timber Company, had informed your Petitioner that all of the assets of Coastal Plywood & Timber Company must be sold in one transaction to one purchaser, and that he would not continually petition the Court for approval of sales of portions of the assets of Coastal Plywood & Timber Company. That J. J. Sugarman Co., N. N. Sugarman, Barney Margolis and Associates informed your Petitioner that they would be interested in purchasing all of the assets of Coastal Plywood & Timber Company only if they were guaranteed a resale of a portion of these assets, and they required that they be protected in the purchase of the assets of Coastal Plywood & Timber Company by other persons and firms placing in escrow written agreements for the purchase of portions of said assets. That your Petitioner was instrumental in procuring various purchasers who were ready, willing and able and did agree to purchase portions of the assets of Coastal Plywood & Timber Company from J. J. Sugarman Co. and Associates after they had acquired said assets. That your Petitioner assisted in securing a resale of a portion of the assets of Coastal Plywood & Timber

Company by procuring for J. J. Sugarman Co., and Sugarman Lumber Company the following purchasers for the following portion of the assets of Coastal Plywood & Timber Company:

1. To Hollow Tree Lumber Company all timber contained in Unit #1 of that certain cruise by Hammon, Jensen & Wallen dated September 22, 1952, for the sum of \$1,350,000.00.

2. To Fred Holm all timber contained in Unit #2 of that certain cruise by Hammon, Jensen & Wallen dated September 22, 1952, for the sum of \$1,200,000.00.

3. To William Moores and William Smith all timber contained in Unit #3 and Unit #4 of that certain cruise by Hammond, Jensen & Wallen, dated September 22, 1952, for the sum of \$2,200,000.00.

4. To William Moores and William Smith, mill, machinery, equipment, lumber and log deck for the sum of \$1,500,000.00.

That these services by your Petitioner resulted in an offer being made by J. J. Sugarman Co. for the purchase of the assets of Coastal Plywood & Timber Company. That by virtue of these services, and the other services mentioned herein, your Petitioner made possible the ultimate consummation of the sale of the assets of Coastal Plywood & Timber Company to Sugarman Lumber Company.

11. That on or about July 22, 1953, a formel offer

on behalf of J. J. Sugarman Co. of Los Angeles, California, was submitted by their attorney, William Steinberg, to Coastal Plywood & Timber Company and Fred G. Stevenot, Trustee, for the purchase of the assets of Coastal Plywood & Timber Company, a corporation, for the sum of Three Million, Seven Hundred Fifty Thousand and 00/100 (\$3,750,000.00) Dollars. A copy of this offer is attached hereto and marked Exhibit A.

12. Following this offer of July 22, 1953, J. J. Sugarman Co., N. N. Sugarman, Barney Margolis, and Associates, continued to negotiate through their attorney, William Steinberg, for the purchase of the assets of Coastal Plywood & Timber Company on terms and conditions which would be satisfactory to the parties concerned and to the creditors and stockholders of Coastal Plywood & Timber Company. That these negotiations resulted in a Second Plan of Reorganization as Amended which was approved by this Court on March 16, 1954, authorizing the sale of the assets of Coastal Plywood & Timber Company for the sum of Four Million, Four Hundred Fifty-Two Thousand, Two Hundred Seventy-Five and 00/100 (\$4,452,275.00) Dollars to Sugarman Lumber Company, a California corporation organized by N. N. Sugarman, Abe Sugarman, Barney Margolis, and Associates for the purpose of purchasing the assets of Coastal Plywood & Timber Company. That a portion of the assets of Coastal Plywood & Timber Company included in said sale to Sugarman Lumber Company procured by your Petitioner as aforesaid consisted of per-

sonal property in the form of a mill, machinery, equipment, lumber and log deck of the reasonable value of approximately One Million, Five Hundred Thousand and 00/100 (\$1,500,000.00) Dollars and that this sale was also consumated through the efforts and services of your Petitioner as aforesaid. That the established broker's commission for the sale of personal property is 10% of the first Five Thousand and 00/100 (\$5,000.00) Dollars and 5% of the balance of the purchase price.

13. That at all times herein mentioned Fred G. Stevenot, as Trustee for Coastal Plywood & Timber Company, was fully aware of, acquiesced in, consented to and took advantage of the services and expenditures of time and money by your Petitioner in procuring Sugarman Lumber Company as an acceptable purchaser of the assets of Coastal Plywood & Timber Company. That your Petitioner was the agency which brought together Coastal Plywood & Timber Company, as Seller, and Sugarman Lumber Company, as Buyer, and was the predominating, effective and procuring cause of the sale of the assets of Coastal Plywood & Timber Company to Sugarman Lumber Company as aforesaid.

14. That your Petitioner has rendered exceptional services to Fred G. Stevenot, as Trustee of Coastal Plywood & Timber Company, and to the creditors and stockholders of the debtor corporation in the administration of the above entitled estate by procuring for said estate the purchaser of the assets of Coastal Plywood & Timber Com-

pany. That the services of your Petitioner were of great benefit to this estate and to the creditors and stockholders of the debtor corporation. That the reasonable value of the services of your Petitioner as a real estate broker is 5% of the total purchase price paid, and that the reasonable value of the services rendered by your Petitioner in the administration of this estate is in the sum of Two Hundred Twenty-Two Thousand Six Hundred Thirteen and 75/100 (\$222,613.75) Dollars.

15. That your Petitioner has no beneficial interest in Coastal Plywood & Timber Company and that after the commencement of this proceeding, no beneficial interest, direct or indirect, in any claims against or stock of the Coastal Plywood & Timber Company, the above named debtor, has been acquired or transferred by your Petitioner, or for his account, other than the claim contained herein.

Wherefore, your Petitioner prays that this Court fix a time and place for the hearing of this Petition for Allowance of Real Estate Brokers Commission; that this Court direct the Trustee in the above entitled proceedings to give notice of the time and place of said hearing as provided by law; that at the hearing of this Petition your Petitioner be allowed a real estate brokers commission for services rendered in the administration of the above entitled estate in the sum of Two Hundred Twenty-Two Thousand Six Hundred Thirteen and 75/100 (\$222,613.75) Dollars, or such other sums as to the Court may seem just and reasonable for the pro-

curing of the purchaser of the assets of debtor corporation; that this allowance be classified as administrative expense and be given the priority of administrative expense as set forth in the Second Plan of Reorganization as amended which has been approved by this Court; and for such other orders and decrees as may be proper in the premises.

Dated: May 24, 1954.

/s/ ALEX E. WILSON,

Petitioner.

FILES & McMURCHIE,

Attorneys for Petitioner.

Duly Verified.

Memorandum of Points and Authorities

National Bankruptcy Act, Section 77B, 241, 242, 243, 247, and 249; (11 USCA Sections 207, 641 and following).

Berman vs. Palmetto Apartments Corporation,
153 Federal 2nd 192.

EXHIBIT "A"

July 22, 1953

Coastal Plywood and Timber Company

and

Fred G. Stevenot, Acting Trustee for

Coastal Plywood and Timber Company

300 Montgomery Street

San Francisco, California

Re: No. 12223 United States District Court

Gentlemen:

On behalf of J. J. Sugarman Co. of Los Angeles, California, I am authorized to make an offer of purchase for them of all of the assets of the Coastal Plywood and Timber Company, a corporation, upon the terms and conditions hereinafter set forth.

The Coastal Plywood and Timber Company, having filed its petition for an arrangement under the provisions of Chapter XI, shall assign, transfer and convey to J. J. Sugarman Co. all of its assets hereinafter described, so as to enable it to effectuate a plan for arrangement under said Chapter XI, as follows:

1. That the total purchase price is \$3,750,000.00 for all of the net assets of Coastal Plywood and Timber Company, consisting of land, timber, lumber, logs, cash, accounts receivable, rolling stock, plant, machinery, equipment, mill site, etc. as per

Balance Sheet of December 31st, 1952, prepared by Hood and Strong, Certified Public Accountants, totalling \$4,555,310.80, or the balance Sheet of June 30th, 1953, whichever is greater, free and clear of all contracts, conditional sales contracts, claims, liens, encumbrances, taxes, penalties, and assessments of every form and nature.

2. The sum of \$750,000.00 to be paid within ten (10) days after acceptance and confirmation of this arrangement by the Court.

3. The balance of \$3,000,000.00 to be paid within ninety (90) days after acceptance and confirmation of this arrangement by the Court, so that J. J. Sugarman Co. can be given the opportunity of organizing a new corporation to take over the said assets, pay the sum of \$3,000,000.00, and to provide adequate working capital for the corporation.

4. That out of the \$3,750,000.00 all contracts, claims, liens, encumbrances, taxes, penalties and assessments of every form and nature are to be paid in order of their priority, and the balance remaining is to be paid to the stockholders, so that J. J. Sugarman Co. and its successor in interest shall receive a good and merchantable title to all of the assets purchased.

5. Upon acceptance and confirmation of this arrangement by the Court, J. J. Sugarman Co., Coastal Plywood and Timber Company, and the Trustee for the latter company, shall mutually agree upon a continuation of the business operations of said Coastal Plywood and Timber Com-

pany until J. J. Sugarman Co. or its successors in interest can take full possession of all of the assets in accordance with the terms hereinabove set forth, and all profits made or losses suffered from the date of acceptance and confirmation of the arrangement by the Court, shall accrue to J. J. Sugarman Co. or its successor in interest.

6. J. J. Sugarman Co. or its successor in interest shall not be responsible for any fees, costs or expenses, by virtue of this transaction being called to their attention.

Very truly yours,

.....

William Steinberg

WS-MG

cc to J. J. Sugarman Co.

Orrick, Dahlquist, Herrington & Sutcliffe

Attorneys for Trustee

Sterling Carr

Attorney for Trustee

Bronson, Bronson & McKinnon

Attorneys for Debtor

[Endorsed]: Filed May 25, 1954.

[Title of District Court and Cause.]

ORDER FIXING HEARING FOR CONSIDER-
ATION OF PETITION FOR ALLOWANCE
OF REAL ESTATE BROKERS COMMIS-
SION

At a Court of Bankruptcy held in and for the Northern District of California, Northern Division, at Sacramento, California, on the 25th day of May, 1954, before the Honorable Judge of the United States District Court for the Northern District of California, Northern Division.

Upon the Petition for Allowance of Real Estate Brokers Commission by Alex E. Wilson dated and duly verified on the 24th day of May, 1954, and sufficient cause appearing therefor.

It is Hereby Ordered, Adjudged and Decreed as follows:

(1) That a hearing for the consideration of said Petition for Allowance of Real Estate Brokers Commission, and for the consideration of such objections as may be made to said Petition, and, in the event said commission is allowed, for the entry of such decrees and orders as may be necessary or appropriate to fix the priority and manner of payment of said commission, shall be held on the 11th day of June, 1954, at the hour of 11 o'clock a.m., or as soon thereafter as the matter can be heard, at the Courtroom of the above entitled Court located in the Post Office Building, Ninth and "I" Streets, Sacramento, California.

(2) That Fred G. Stevenot, as Trustee of Coastal Plywood & Timber Company, is hereby ordered and directed to cause notice of said hearing to be given to the Debtor, to the creditors and stockholders of the Debtor and any indenture trustee, and to the Securities and Exchange Commission, by mailing, at least ten days before said hearing, a copy of a notice thereof to the last known address or place of business of each of said persons, and by publication of such notice at least once a week for two successive weeks in the "Sonoma County Herald", the first of such publications to be at least one week before said hearing. Such notice shall be substantially in the following form:

Notice of Petition for Allowance of Real
Estate Brokers Commission

In the United States District Court for the Northern District of California, Northern Division

In the Matter of Coastal Plywood & Timber Company, a corporation, Debtor—No. 12223.

To the creditors, stockholders, and any indenture trustee of Coastal Plywood & Timber Company, and to the Secretary of the Treasury and the Securities and Exchange Commission:

Pursuant to an order of the above entitled Court made and entered on the 25th day of May, 1954, Notice Is Hereby Given That on the 11th day of June, 1954, at the hour of 11 o'clock a.m., or as soon thereafter as the matter can be heard, at the court-

room of the above entitled Court located in the Post Office Building, Ninth and "I" Streets, Sacramento, California, a hearing will be held for the consideration of a Petition for Allowance of Real Estate Brokers Commission, and for the consideration of such objections as may be made to such allowance, and, in the event said commission is allowed, for the entry of such decrees and orders as may be necessary or appropriate to fix the priority and manner of payment of said commission.

The original Petition for Allowance of Real Estate Brokers Commission may be examined at the office of the Clerk of the above entitled Court in the Post Office Building, Ninth and "I" Streets, Sacramento, California, and copies thereof may be examined at the office of the undersigned and at the office of the Debtor.

Dated: May 25, 1954.

FRED G. STEVENOT,
As Trustee of Coastal Plywood
& Timber Company.

Dated: May 25, 1954.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed May 25, 1954.

[Title of District Court and Cause.]

OBJECTIONS BY TRUSTEE TO ALLOW-
ANCE OF REAL ESTATE BROKER'S
COMMISSION

To the Honorable Judge of the United States District Court for the Northern District of California, Northern Division:

Fred G. Stevenot, the duly appointed, qualified and acting Trustee of the Estate of Coastal Plywood & Timber Company, objects to the allowance of any real estate broker's commission or other compensation to Alex E. Wilson, claimed in the Petition for Allowance of Real Estate Brokers Commission filed herein on May 25, 1954, on the following grounds:

1. Your Trustee is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of said petition.

2. Your Trustee denies each and all of the allegations contained in Paragraph 3 of said petition, except that your Trustee admits that petitioner called upon your Trustee in July, 1952, and ascertained that your Trustee was considering the sale of certain timber-cutting rights of the Debtor.

3. Your Trustee is without knowledge or information sufficient to form a belief as to the truth of the allegations commencing with the word "That" in line 8, page 2 of said petition and ending with the

word "Nielson" in line 12, page 2 of said petition, constituting a portion of Paragraph 4 of said petition.

4. Your Trustee denies each and all of the allegations commencing with the word "the" in line 22, page 2 of said petition and ending with the word "Petitioner" in line 26, page 2 of said petition, constituting a portion of Paragraph 5 of said petition, except that your Trustee admits that this Honorable Court authorized your Trustee to pay to petitioner, from the proceeds of sale of certain contracts, pursuant to the specific authorization and requirement of the purchasers of such contracts, the sum of \$5,000 and that such sum was paid to petitioner.

5. Your Trustee is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of said petition.

6. Your Trustee denies each and all of the allegations contained in Paragraph 7 of said petition, except that your Trustee admits that petitioner called upon your Trustee on several occasions and stated to your Trustee that petitioner was endeavoring to develop a reorganization proposal on behalf of various clients or prospective clients of petitioner for submission to your Trustee, admits that certain letters concerning such endeavor were received by your Trustee, and further admits that your Trustee delivered to petitioner and other prospective proponents of reorganization proposals various financial reports and other information concerning the Debtor's assets and properties.

7. Your Trustee is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 of said petition.

8. Your Trustee denies each and all of the allegations commencing with the word "That" in line 18, page 4 of said petition and ending with the word "Company" in line 23, page 4 of said petition, constituting a portion of Paragraph 10 of said petition. Your Trustee is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said Paragraph 10.

9. Your Trustee denies each and all of the allegations contained in Paragraph 12 of said petition, except that your Trustee admits that, during the period commencing on or about July 22, 1953 and ended on or about December 12, 1953, your Trustee negotiated with N. N. Sugarman, Abe Sugarman and Barney Margolis, and their attorney, Nathan M. Dicker, for the sale of assets of the Debtor; that these negotiations resulted in the receipt by your Trustee from Sugarman Lumber Company on December 12, 1953, of an offer to purchase substantially all of the assets of the Debtor; that your Trustee prepared and submitted to this Honorable Court a Second Plan of Reorganization of the Debtor based upon said offer; that further negotiations with the aforesaid individuals and with Samuel C. Rudolph and Charles J. Katz resulted in certain improvements to the aforesaid offer and Second Plan of Reorganization; that said Second Plan of Reorganization was confirmed by Order of this

Honorable Court entered March 16, 1954; that, pursuant to said Second Plan of Reorganization, as amended, your Trustee has sold all assets of the Debtor, except cash, receivables and certain rights to recover property taxes, to Sugarman Lumber Company; and that a portion of the assets so sold consisted of personal property.

10. Your Trustee denies each and all of the allegations contained in Paragraph 13 of said petition.

11. Your Trustee denies each and all of the allegations contained in Paragraph 14 of said petition.

12. Your Trustee is informed and believes and therefore alleges that petitioner, at all of the times mentioned in said petition, acted on behalf of a person or persons other than your Trustee, and that petitioner at no time represented or acted for or on behalf of your Trustee, the Debtor or any other party in interest in these proceedings.

Wherefore, your Trustee prays that said petition of Alex E. Wilson for allowance of a real estate broker's commission be dismissed.

Dated: San Francisco, California, June 10, 1954.

/s/ FRED G. STEVENOT,
Trustee.

ORRICK, DAHLQUIST, HER-
RINGTON & SUTCLIFFE,

/s/ STERLING CARR,
Attorneys for Trustee.

Duly Verified.

[Endorsed]: Filed June 11, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF TRUSTEE IN OPPOSITION
TO PETITION FOR ALLOWANCE OF
REAL ESTATE BROKERS COMMISSION

State of California,
City and County of San Francisco—ss.

Fred G. Stevenot, being first duly sworn, deposes and says:

1. That he is the duly appointed, qualified and acting Trustee of the estate of Coastal Plywood & Timber Company, the Debtor herein, and for the purpose of the record herein outlines all of his conferences and discussions with Alex E. Wilson, claimant named in the above-mentioned petition.

2. That, prior to December 12, 1952, the Debtor herein owned certain timber-cutting rights evidenced by four contracts, and various supplements thereto, which contracts are more particularly described in the petition of affiant for authority to sell said contracts filed herein on October 16, 1952; that, in July, 1952, said Alex E. Wilson came to affiant's office and advised affiant that said Alex E. Wilson could sell said cutting rights; that affiant stated to said Alex E. Wilson that affiant was endeavoring to negotiate certain modifications of said contracts which were necessary to permit affiant to exercise said timber-cutting contracts on behalf of the Debtor, but that if such negotiations were unsuccessful affiant proposed to sell said contracts,

subject to the approval of this Honorable Court, if a reasonable price could be obtained; that said Alex E. Wilson told affiant that said Alex E. Wilson had a party interested in purchasing said contracts; that affiant specifically stated to said Alex E. Wilson that affiant would consider any offer which might be submitted but that neither affiant nor the Debtor would employ any broker or agent to act on behalf of affiant or the Debtor in connection with the offer or sale of said contracts; that affiant at no time instructed or authorized said Alex E. Wilson or any other person to offer or sell said contracts or any other property of the Debtor, or to act on behalf of affiant or the Debtor in any respect whatsoever, and in truth and fact affiant then stated to said Alex E. Wilson that said Alex E. Wilson must act only on behalf of the purchaser of said contracts and not on behalf of affiant; that said Alex E. Wilson then knew that affiant was acting in a fiduciary capacity, to wit, as Trustee of the Debtor under the jurisdiction of this Honorable Court, and knew, and was told by affiant, that affiant was not empowered to employ any real estate agent or broker or to bind the estate of the Debtor for the payment of any fee or commission.

3. That, on or about August 19, 1952, said Alex E. Wilson, acting on behalf of Clarence L. Nielson, submitted to affiant an offer of said Clarence L. Nielson to purchase said contract for a price of \$100,000, conditioned upon negotiation of satisfactory changes in said contracts; that said offer was accepted by affiant, subject to the approval of

this Court; that said Clarence L. Nielson was unable at that time to negotiate the changes in said contracts, and affiant continued to negotiate with said Clarence L. Nielson and his attorney, Aaron Cohen, for a sale of the Debtor's interest in said contracts; that, on October 11, 1952, affiant received from Clarence L. Nielson and Amy K. Nielson a new offer to purchase said contracts; that said offer by its terms recited that

“The purchase price to be paid by the undersigned is the sum of \$100,000, subject to a real estate commission of \$5,000 to be paid by Coastal Plywood & Timber Company to A. W. Wilson.”

that said A. W. Wilson referred to in said offer is the said Alex E. Wilson; that affiant forthwith endeavored to induce Clarence L. Nielson and Amy K. Nielson to eliminate from their said offer the requirement that Coastal Plywood & Timber Company pay a commission, for the reason that said Alex E. Wilson had represented Clarence L. Nielson and Amy K. Nielson and had not, and was not authorized to, represent affiant; that Clarence L. Nielson and Amy K. Nielson refused to invest more than \$100,000 in said contracts, including said commission, and therefore refused to eliminate said requirement; that the purchase price was accordingly adjusted by reducing the price to be paid to the Debtor to \$95,000 to enable said Clarence L. Nielson and Amy K. Nielson to limit their total investment to \$100,000; that affiant was of the opinion that \$95,000 was a reasonable price for said

contracts and agreed to submit said offer to this Honorable Court; that said offer was submitted to this Honorable Court by petition of your affiant filed in the above-entitled proceedings on October 16, 1952, which petition and the offer of Clarence L. Nielson and Amy K. Nielson attached thereto are by reference hereby incorporated herein and made a part hereof; that said petition recites that

“your petitioner was advised by Clarence L. Nielson that he and his wife were prepared to purchase said contracts for the sum of \$100,000, less the sum of \$5,000 to be paid to A. W. Wilson as a real estate commission * * *” (said A. W. Wilson being the said Alex E. Wilson); that by Order Dated November 12, 1952, this Honorable Court authorized affiant to sell and assign said contracts to Clarence L. Nielson and Amy K. Nielson on the terms set forth in said offer and to pay over to said Alex E. Wilson the sum of \$5,000 from the proceeds of such sale as required by said offer, resulting in a net price to the Debtor of \$95,000; that, pursuant to said Order, affiant did sell and assign said contracts to Clarence L. Nielson and Amy K. Nielson and did pay over to said Alex E. Wilson the sum of \$5,000; that said sum of \$5,000 was not paid to said Alex E. Wilson as a commission or compensation for services rendered on behalf of the Debtor or affiant, but was paid solely because such payment was a condition to the purchase of said contracts by said Clarence L. Nielson and Amy K. Nielson; that said Alex E. Wilson at not time was authorized to represent or act

for or on behalf of affiant or the Debtor and that said Alex E. Wilson at no time represented or performed any services for or on behalf of affiant or the Debtor.

4. That, following the sale of said contracts to Clarence L. Nielson and Amy K. Nielson, said Alex E. Wilson called upon affiant and inquired as to the status of affiant's efforts to reorganize the Debtor; that, in view of the fact that Clarence L. Nielson and Amy K. Nielson had conditioned their purchase of timber contracts of the Debtor as afore-said upon payment of a commission to said Alex E. Wilson, affiant immediately admonished said Alex E. Wilson that under no circumstances would affiant employ any agent or broker to act for affiant or the Debtor in the solicitation, development or submission of an offer to purchase any assets of the Debtor or other reorganization proposal; that affiant stated to said Alex E. Wilson that under no circumstances would affiant or the Debtor pay any commission or other compensation to said Alex E. Wilson or any other broker for any efforts which might be made to obtain a purchaser of assets of the Debtor or to develop a reorganization proposal; that affiant emphasized repeatedly to said Alex E. Wilson that said Alex E. Wilson was not authorized and would not be authorized to represent or act on behalf of affiant or the Debtor to any extent whatsoever and that if said Alex E. Wilson made any effort to develop a sale of the Debtor's properties or other reorganization proposal, said Alex E. Wilson must act solely on behalf of the pur-

chasers or other proponents; that affiant further advised said Alex E. Wilson that, while affiant would consider all proposals submitted, affiant was then primarily interested in developing a reorganization plan which would preserve the equity interest in the Debtor's properties for its stockholders and that affiant would not sell the Debtor's properties except as a last resort; that said Alex E. Wilson repeatedly on several occasions stated to affiant that said Alex E. Wilson fully understood all of the foregoing and would seek compensation from the proponents of any offer or proposal which he might submit.

5. That affiant at no time authorized said Alex E. Wilson to represent or act for or on behalf of affiant or the Debtor; that affiant at no time invited said Alex E. Wilson to call upon affiant and, while said Alex E. Wilson did call at affiant's office on several occasions and advised affiant that he was working on a reorganization proposal, affiant always understood from his discussions with said Alex E. Wilson that said Alex E. Wilson was acting on behalf of the proponents of such proposal; that, in order that there could be no misunderstanding, affiant repeated to said Alex E. Wilson on numerous occasions that under no circumstances would said Alex E. Wilson be employed or authorized to represent or act for or on behalf of the Debtor or affiant and under no circumstances would any commission or compensation be paid to said Alex E. Wilson by affiant or from the Debtor's estate; that said Alex E. Wilson stated to affiant that he would obtain his compensation from the proponents

of any offer or proposal which he might submit and would not seek any compensation from affiant or the Debtor; that on July 22, 1953, affiant mailed to said Alex E. Wilson the following letter, to-wit:

“July 22, 1953

Mr. Alex E. Wilson
155 Montgomery Street
San Francisco, California

Dear Mr. Wilson:

I wish to thank you for your letter of July 17 advising me of your current efforts to develop a plan of reorganization of Coastal Plywood and Timber Company.

The plan of reorganization which I have filed with the Court has not yet been passed upon by Judge Lemmon and I will receive and consider any proposals which you may desire to submit on behalf of your clients. Of course, any plan which you may submit should be of the nature contemplated by Chapter X of the Bankruptcy Act. Moreover, as I have previously advised you, neither I nor Coastal Plywood & Timber Company may be obligated for any commissions payable in connection with such a plan, and any such commissions must be paid by the investors for whom you act.

Yours very truly,
Fred G. Stevenot,
Trustee,
Coastal Plywood & Timber Company”

that said Alex E. Wilson admitted to affiant on several occasions that said Alex E. Wilson received the foregoing letter.

6. That said Alex E. Wilson on several occasions requested from affiant various financial reports and other information concerning the Debtor's properties and operations, which reports and information were supplied by affiant; that such reports and information were supplied to said Alex E. Wilson because said Alex E. Wilson represented to affiant that he and his associates were developing a reorganization proposal or offer for submission to affiant; that affiant supplied similar reports and information to numerous other firms, corporations and individuals who indicated to affiant that they were considering or developing a reorganization proposal for submission to affiant; that affiant deemed it advisable, and in fact affiant's duty as Trustee herein, to widely disseminate information concerning the Debtor in order that all reorganization possibilities might be explored.

7. That, on July 3, 1953, affiant was advised by the Reconstruction Finance Corporation, the principal creditor of the Debtor, that said creditor would not approve the first plan of reorganization filed herein by affiant; that thereafter affiant endeavored to attract offers to purchase the properties of the Debtor in order to avert a threatened foreclosure by said creditor; that on July 22, 1953, William Steinberg, an attorney at law, purporting to act for J. J. Sugarman Co. of Los Angeles, California, submitted to affiant an offer to purchase

all of the assets of the Debtor for a price of \$3,750,000; that on or about said date said Alex E. Wilson called at affiant's office and stated to affiant that said Alex E. Wilson had participated in the preparation of said offer; that said statement by Alex E. Wilson to affiant has never been confirmed by any officer or authorized representative of J. J. Sugarman Co.; that affiant at said meeting again repeated to said Alex E. Wilson that said Alex E. Wilson was not authorized to represent or act for or on behalf of affiant or the Debtor and that no commission or compensation would be paid to said Alex E. Wilson by affiant or the Debtor; that said Alex E. Wilson replied to affiant that he was acting for and would be compensated by said William Steinberg; that on several occasions thereafter said Alex E. Wilson stated to affiant that said Alex E. Wilson had an agreement with said William Steinberg for the payment by said William Steinberg to said Alex E. Wilson of compensation for calling the sale of the Debtor's properties to the attention of said William Steinberg; that said Alex E. Wilson thereafter furnished to affiant's counsel a copy of the following letter received by said Alex E. Wilson from said William Steinberg:

"August 25, 1953.

Mr. Alex E. Wilson,
155 Montgomery Street, Suite 501,
San Francisco, California.

Dear Sir:

This is to acknowledge that you brought to my attention the sale of the Coastal Plywood

Company and that I in turn brought it to the attention of N. N. Sugarman of Los Angeles who evidenced a great interest in purchasing the same.

When and if N. N. Sugarman or his associates purchase the Coastal Plywood Company they have agreed to compensate me reasonably.

Out of this compensation I hereby agree to pay to Alex E. Wilson the sum of \$25,000 and to Redge Kuhen the sum of \$10,000.

Very truly yours,

/s/ William Steinberg."

8. That said offer presented to affiant by William Steinberg was not acceptable to affiant; that, commencing in November, 1953, affiant negotiated with N. N. Sugarman and Barney Margolis and their attorney, Nathan M. Dicker, concerning a possible offer to purchase assets of the Debtor; that said negotiations continued over a period of several weeks and culminated in an offer by Sugarman Lumber Company, of Los Angeles, California, to purchase all of the assets of the Debtor except cash, accounts receivable and certain rights to recover property taxes; that said offer was dated December 12, 1953, and is attached to and constitutes a part of the Second Plan of Reorganization of the Debtor filed by affiant herein on December 21, 1953, which Second Plan of Reorganization is by reference hereby incorporated herein and made a part hereof; that thereafter affiant continued to negotiate with said Sugarman Lumber Company and obtained cer-

tain improvements to said offer of Sugarman Lumber Company, which amendments were incorporated in the Second Plan of Reorganization, as amended, confirmed by Order of this Honorable Court on March 16, 1954; that neither said Alex E. Wilson nor said William Steinberg participated in any of the aforesaid negotiations.

9. That affiant has been informed by said Sugarman Lumber Company that said Alex E. Wilson did not call Coastal Plywood & Timber Company to the attention of said Sugarman Lumber Company or any officer or authorized representative thereof, that said Alex E. Wilson did not procure Sugarman Lumber Company as a purchaser of assets of said Debtor and was not the procuring cause of the sale of the assets of the Debtor to said Sugarman Lumber Company, and that in fact said Alex E. Wilson never spoke to any officer or authorized representative of said Sugarman Lumber Company until after confirmation of the Second Plan of Reorganization, as amended.

10. That, in any event said Alex E. Wilson was not at any time authorized by affiant to represent or act for or on behalf of affiant or the Debtor herein, and affiant clearly and unequivocally stated to said Alex E. Wilson on many occasions throughout the period covered by the foregoing paragraphs of this affidavit that said Alex E. Wilson had no such authority; that said Alex E. Wilson on each such occasion represented to affiant that said Alex E. Wilson fully understood that he had no such authority and that he was representing, and would

be compensated by, the proponents of any offer or other proposal which he might submit; and that affiant relied upon said representations of said Alex E. Wilson in preparing and submitting his Second Plan of Reorganization of the Debtor for approval and confirmation herein.

/s/ FRED G. STEVENOT.

Subscribed and sworn to before me this 10th day of June, 1954.

[Seal] /s/ LUCIE M. REINCKE,
Notary Public in and for the City and County of
San Francisco, State of California. My commis-
sion expires November 19, 1954.

[Endorsed]: Filed June 11, 1954.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Petitioner, Alex E. Wilson, filed this claim for the allowance of a real estate broker's commission on the sale of certain assets by Coastal Plywood & Timber Company, the debtor in these proceedings. The assets were sold pursuant to a plan of reorganization of the debtor, which was carried out in accordance with Chapter X of the National Bankruptcy Act. The trustee of the debtor in the reorganization proceedings, Fred G. Stevenot, resists petitioner's claim, contending: that petitioner is not within the class of persons designated by the National Bankruptcy Act as entitled to compensation;

that petitioner was not an agent of the trustee or of the debtor; that petitioner was a volunteer; that petitioner should have obtained court authorization in advance of rendering any services; that the absence of a written contract renders petitioner's claim subject to the defense of the statute of frauds; that petitioner cannot recover because he assumed positions of conflicting interests; and that petitioner's efforts did not benefit the bankrupt estate.

Petitioner's position is summarized on page two of his closing brief as follows:

“Clearly, these services rendered at the special instance and request of the Trustee, accepted by the Trustee, and of great benefit to the bankrupt estate, create an obligation to pay for these services which is recognized both at law and in proceedings under the Bankruptcy Act.”

It is true that petitioner rendered services, the services were accepted by the trustee, and the services were of real benefit to the bankrupt estate; but this Court finds that petitioner was a volunteer and therefore no obligation to pay for the services was created.

Petitioner and the trustee are in substantial agreement as to what occurred, but they differ as to the legal effect of their actions. The pertinent facts are these: The trustee became interested in selling all of the debtor's assets. Therefore he encouraged petitioner and other real estate brokers

to find a buyer for those assets. Petitioner became quite active in the search for prospective buyers, and the trustee cooperated with him in his efforts (by enabling petitioner to show the property to interested parties, etc.), but the trustee repeatedly warned petitioner that neither the trustee nor the debtor would pay any broker's commission, and that petitioner would have to look to the buyer for his compensation. There is a dispute as to whether the petitioner protested orally that he could not be expected to represent the buyer, and that he expected the trustee to treat him fairly, but there is no dispute on the fact that the trustee on several occasions told the petitioner that the bankrupt estate could not pay a commission without court authorization, and that petitioner would have to look to the buyer for his commission. The record further shows that there had been a prior partial sale of some assets of the bankrupt estate in the nature of timber cutting rights, which sale had been negotiated by the petitioner under the same warning, and that the trustee had asked the court to approve the payment of a real estate commission to petitioner, but that the trustee had followed this procedure upon the instance of the buyer. The court did approve the prior partial sale and the payment of a real estate commission to petitioner, and the commission was paid by the estate to petitioner from the proceeds of the sale.

Petitioner contends that an obligation to pay for his services arose by implication from the fact that the trustee accepted the benefit of the services un-

der those circumstances. The trustee admits that he was willing to do business with a reliable buyer produced by petitioner or any other real estate broker; but this does not necessarily imply a willingness to pay a broker's commission, especially in view of the fact that petitioner knew of the trustee's unwavering opposition to paying a commission to anyone. The case of *Gold v. South Side Trust Co.*, 3rd Cir., 179 Fed. 210, 213, cert. denied, 218 U. S. 671, involved a claim which arose under circumstances very similar to the claim presented here. The petitioner's claim was denied in that case because, there as here, "He was not only a volunteer, but a volunteer with warning." See also *In re Mt. Forest Fur Farms of America*, D. Mich., 62 F. Supp. 59, 70; *In re Porto Rican American Tobacco Co.*, 2d Cir., 117 F. 2d 599, 602; *In re Prudence Bonds Corp.*, 2d Cir., 122 F. 2d 258, 263.

The finding that petitioner was a volunteer disposes of petitioner's claim, and therefore it will not be necessary to consider in detail the other contentions made by the trustee. It should be noted, however, that there is respectable authority for the trustee's contention that petitioner cannot recover without showing that he obtained court authorization for his services before rendering them. *In re Grim*, E. D. Pa., 35 F. Supp. 15; *In re Equitable Office Building Corp.*, S. D. N. Y., 83 F. Supp. 531, 580. Petitioner answered this argument by relying on *Berman v. Palmetto Apartments Corp.*, 6th Cir., 153 F. 2d 192. In the *Berman* case the district court had denied the claim of a real estate broker for

an allowance for services rendered in connection with corporate reorganization proceedings. The court of appeals reversed, holding that it was not essential for the broker to show that there was a valid existing contract between him and the trustee for the payment of a broker's commission, and also holding that the broker had an equitable basis for his claim. But the Berman case is readily distinguishable from the case at bar. At page 193 of 153 F. 2d the court of appeals said:

“* * * [the broker] certainly had equitable if not legal rights, since at the behest of the Trustees and after diligent effort, he found the pur-
chaser.” (Emphasis supplied.)

In the case at bar petitioner admits that the trustee warned him that the trustee would not pay him a commission; in contrast to this, the trustees in the Berman case agreed to pay a commission to the broker, and provided for the payment of a commission in a written notice of the proposed sale which was circulated to all the holders of the trust certificates of the bankrupt. More than two-thirds of the certificate holders approved the sale including the provision for the broker's commission. This important difference makes the Berman case inapplicable to the case at bar.

To torture an agreement to pay a commission out of these facts would be to create an implied contract where none in fact existed. Equity can enforce the contract, whether express or implied, but equity cannot make the contract for the parties

where there was in fact no understanding upon which a contract could be founded.

Judgment, therefore, is awarded to the trustee with his costs, and counsel for the trustee is directed to prepare findings, conclusions and an order in conformity herewith.

Dated: January 26, 1955.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed January 26, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW AND ORDER DENYING CLAIM OF
ALEX E. WILSON

There having been filed in the above-entitled proceedings a petition by Alex E. Wilson for the allowance of a real estate broker's commission on a sale of certain assets pursuant to a plan of reorganization of the above-named Debtor; and Fred G. Stevenot, the Trustee herein, having filed herein his written objections to the allowance of any such commission; and said petition and objections having come on regularly for hearing before the above entitled Court, Honorable Oliver J. Carter presiding, on the 21st day of June, 1954, the 6th day of July, 1954 and the 2nd day of August, 1954, petitioner being represented at said hearing by his counsel, Clifton Hildebrand, Esq., and Messrs. Files

& McMurchie, and the above-named Debtor being represented at said hearing by its counsel, Herbert Dudley, Esq., and the above-named Trustee being represented at said hearing by his counsel, Walter G. Olson, Esq., of the firm of Messrs. Orrick, Dahlquist, Herrington & Sutcliffe; and evidence, oral and documentary, having been introduced in support of said petition and in opposition thereto, and all parties interested having been heard; and the Court having heard and duly considered all the evidence and arguments of counsel and having considered the law and the facts, and being duly advised, now makes and files this, its Findings of Fact and Conclusions of Law.

Findings of Fact

The Court finds the following facts:

1. Petitioner's first contact with either the Debtor or the Trustee occurred in July, 1952, when he called upon the Trustee and stated to the Trustee that he had a buyer for certain timber contracts then owned by the Debtor. The Trustee advised petitioner that he was endeavoring to negotiate changes in these contracts which would enable the Debtor to take advantage of these contracts. The Trustee informed petitioner that in the event he determined that these contracts should be sold, neither the Trustee nor the Debtor would pay any commission on the sale and that any compensation to petitioner would have to be paid by the buyer of the contracts.

2. On August 19, 1952, Clarence L. Nielson sub-

mitted to the Trustee a proposal for the purchase of said contracts, which proposal was conditioned upon said Clarence L. Nielson being able to negotiate changes in said contracts satisfactory to him. This proposal was prepared by petitioner for said Clarence L. Nielson on the letterhead of petitioner. Said Clarence L. Nielson was not successful in negotiating the desired changes in the contracts and the Trustee therefore did not submit said proposal to the Court for approval. Thereafter, said Clarence L. Nielson and Amy K. Nielson, his wife, presented to the Trustee a new offer, dated October 11, 1952, to purchase said contracts for a gross price of \$100,000, which offer was subject to the express condition that the sum of \$5,000 be paid to petitioner out of such gross price. Following receipt of this offer, the Trustee and his counsel conferred with the said Nielsons and petitioner, at which time the Trustee objected to the condition imposed in the offer that petitioner be paid \$5,000 out of the gross price, and endeavored to induce the said Nielsons to eliminate this condition. The said Nielsons, however, refused to eliminate this condition and insisted that \$5,000 be paid to petitioner and that the offer be accepted immediately in the form submitted in order to avoid any further delay. The Trustee thereupon agreed to submit the offer of the said Nielsons to the Court, and thereafter filed a petition in these proceedings presenting said offer to this Court. In said petition, the Trustee fully advised this Court and all interested parties that said offer was conditioned upon the

payment to petitioner of \$5,000 of the the proceeds of said sale. Thereafter, on November 3, 1952, a hearing on said petition of the Trustee was held before the Court following notice to all creditors and stockholders of the Debtor, and on November 12, 1952, the Court issued its Order approving said offer of Clarence L. Nielson and his wife and authorizing the Trustee to consummate the sale in accordance with the terms of said offer.

3. Petitioner represented and acted on behalf of the said Nielsons in the above-described transaction and did not represent the Trustee or the Debtor. On August 9, 1952, prior to the sale of said contracts, the said Nielsons had entered into an agreement with petitioner in which they agreed to require the Debtor to pay petitioner's "costs" in connection with said sale, and further agreed to pay petitioner a brokerage fee for procuring said contracts for them. Pursuant to said agreement, the said Nielsons inserted in their offer to the Trustee the aforesaid condition that \$5,000 be paid to petitioner from the proceeds of the sale, and petitioner received said sum from said proceeds solely because of said condition. In addition, petitioner negotiated a loan on behalf of the said Nielsons, the proceeds of which were used to purchase said contracts of the Debtor.

4. During the period from July, 1952 to July, 1953 the Trustee endeavored to develop a plan of reorganization of the Debtor which would not involve the disposition of any assets of the Debtor and which would preserve for the stockholders their

interest in the Debtor's business and properties. On June 15, 1953, the Trustee filed herein his First Plan of Reorganization of the Debtor, which Plan did not contemplate the sale of any assets of the Debtor but, rather, contemplated the retention of all of its properties, the sale of additional shares of capital stock and the creation of a voting trust for the protection of creditors. In July, 1953, the Reconstruction Finance Corporation, the principal creditor of the Debtor, notified the Trustee that it would not accept said Plan and the Trustee then, for the first time, determined that it was necessary to sell the assets of the Debtor to avert foreclosure.

5. During the period from July, 1952 to July, 1953 a number of persons, including petitioner, called upon the Trustee and indicated that they were considering the development of a proposal or plan of reorganization of the Debtor. The Trustee furnished all such persons, including petitioner, with information concerning the Debtor and its properties and permitted them to inspect such properties. Petitioner was expressly informed by the Trustee, during said period from July, 1952 to July, 1953, that the Trustee was not interested in a sale of the Debtor's properties but was endeavoring to develop a plan of reorganization which would preserve for the Debtor's stockholders a participation in such properties and their operation. Moreover, the Trustee repeatedly notified the petitioner during said period that neither the Trustee nor the Debtor would employ any broker or pay any commission in connection with any plan of re-

organization, and that if petitioner endeavored to develop any plan, he must represent, and be compensated by, the proponents of such plan. Petitioner was further advised by the Trustee, on several occasions, that neither the Debtor nor the Trustee could pay a commission to petitioner without prior Court authorization and that petitioner would have to look to the buyer for his commission. During the latter part of 1952 and during 1953, petitioner called at the offices of the Trustee at various times, without invitation from the Trustee, and on such occasions the Trustee repeatedly and unequivocally notified petitioner that no broker would be employed or compensated by the Trustee or the Debtor.

6. On July 22, 1953, petitioner received from the Trustee a letter, which stated, insofar as is material here, as follows:

“The plan of reorganization which I have filed with the Court has not yet been passed upon by Judge Lemmon, and I will receive and consider any proposals which you may desire to submit on behalf of your clients. Of course, any plan which you may submit should be of the nature contemplated by Chapter X of the Bankruptcy Act. Moreover, as I have previously advised you, neither I nor Coastal Plywood & Timber Company may be obligated for any commissions payable in connection with such a plan, and any such commissions must be paid by the investors for whom you act.”

Said letter stated only what the Trustee had pre-

viously repeated verbally to the petitioner on numerous occasions over a long period of time. Shortly after July 22, 1953, petitioner called at the Trustee's office and acknowledged receipt of said letter but voiced no objection thereto.

7. On July 23, 1953 or July 24, 1953, the Trustee received from William Steinberg an offer, purportedly on behalf of J. J. Sugarman Co. of Los Angeles, California, to purchase all of the assets of the Debtor for the sum of \$3,750,000. At the time the Trustee received said offer, petitioner and said Steinberg advised the Trustee that petitioner was being compensated by said Steinberg. The Trustee refused to consider said offer submitted by said Steinberg and advised said Steinberg that he would require an offer of at least \$4,250,000. Thereupon, J. J. Sugarman Co. advised said Steinberg that it was not interested in a purchase of the assets of the Debtor, and said Steinberg began representing a Mr. Jamieson, who also evidenced an interest in a purchase of the assets of the Debtor. Said Steinberg represented said Jamieson from August 15, 1953 through the first week in October, 1953.

8. In connection with his representation of J. J. Sugarman Co. and, subsequently, Mr. Jamieson, said Steinberg obtained an offer from a Mr. Holm to repurchase a portion of the Debtor's timber from his clients. Mr. Holm was introduced to said Steinberg by petitioner.

9. On July 22, 1953, said Steinberg entered into an oral agreement with petitioner, which agreement

was confirmed by said Steinberg by a letter to petitioner dated August 25, 1953, whereby said Steinberg agreed to pay petitioner \$25,000 for petitioner's services in bringing the Debtor to his attention. Petitioner has also entered into an agreement with Mr. Holm, one of the ultimate purchasers of a portion of the Debtor's properties, whereby said Holm is to receive a portion of any amount which petitioner might recover from the Debtor on the claim herein denied.

10. In October, 1953, the Trustee entered into negotiations with N. Sugarman and B. Margolis for the sale of assets of the Debtor to Sugarman Lumber Company. The Trustee engaged in extensive negotiations with said Sugarman Lumber Company, which culminated in the presentation to the Trustee on December 12, 1953 of an offer by Sugarman Lumber Company to purchase the assets of the Debtor. Neither petitioner nor said Steinberg participated in these negotiations between the Trustee and said Sugarman Lumber Company. The offer of said Sugarman Lumber Company was thereafter incorporated by the Trustee as part of his Second Plan of Reorganization of the Debtor, filed on December 21, 1953.

11. On January 7, 1954, the Court entered its Order approving said Second Plan of Reorganization and directing that it be submitted to creditors and stockholders of the Debtor for their votes. On March 16, 1954, following the acceptance of said Plan in writing by more than two-thirds of each

class of creditors of the Debtor and more than a majority of the stockholders of the Debtor, the Court entered its Order confirming said Second Plan of Reorganization, as amended, and directed the Trustee to consummate said Plan. On April 16, 1954, the Trustee, pursuant to said Order, conveyed the assets of the Debtor to said Sugarman Lumber Company pursuant to said Second Plan of Reorganization, and, prior to the filing of petitioner's petition herein, the Trustee had taken substantially all of the remaining steps required for the consummation of said Plan. Said Sugarman Lumber Company resold a substantial portion of the assets purchased pursuant to said Plan to the aforesaid Mr. Holm and also resold portions of said assets to persons with whom the said Steinberg had previously negotiated.

12. Petitioner was clearly and unequivocally notified by Trustee, both verbally and in writing, before and repeatedly during the period of the alleged services for which petitioner seeks compensation, that neither the Debtor nor the Trustee would employ any broker or agent or pay any commission or compensation to any agent in connection with any plan or reorganization or sale. Petitioner never requested the Trustee to employ him as a broker, and never advised the Trustee that he expected or would seek compensation from the Debtor or the Trustee until May, 1954, after said Second Plan of Reorganization, including the sale to said Sugarman Lumber Company, had been consummated.

13. Neither the Second Plan of Reorganization nor any other instrument filed with the Court prior to the filing of petitioner's petition herein disclosed to the Court or to the creditors and stockholders of the Debtor that a commission or other compensation might be payable to petitioner or any other broker in connection with said Second Plan of Reorganization, or the sale to said Sugarman Lumber Company contemplated therein. The Court and the creditors and the stockholders of the Debtor were never advised, prior to the filing of petitioner's petition herein, that petitioner expected to receive a commission or other compensation from the Debtor. The Court approved and confirmed said Second Plan of Reorganization, and the creditors and stockholders of the Debtor submitted their binding acceptances of said Second Plan of Reorganization, in complete ignorance of the claim upon which petitioner now seeks to recover.

14. The Trustee relied upon his understanding with petitioner that petitioner was not representing the Trustee or the Debtor and would not receive any compensation from the Trustee or the Debtor, in presenting said Second Plan of Reorganization to the Court and to the creditors and stockholders of the Debtor for approval, and in consummating said Second Plan of Reorganization following such approval.

Conclusions of Law

From the foregoing Findings of Fact, the Court concludes, as a matter of law, that:

1. Petitioner is not entitled to any real estate

broker's commission or any other compensation whatsoever from the Trustee or the estate of the Debtor herein.

2. Neither the Trustee nor the Debtor entered into or offered to enter into any contract or agreement or understanding, express or implied, with petitioner for the employment of petitioner as a real estate broker or agent or employee of the Trustee or the Debtor, and neither the Trustee nor the Debtor agreed or offered to pay to petitioner any commission or other compensation in connection with any of the alleged services for which petitioner seeks compensation.

3. Petitioner was, at best, a volunteer with full warning, at all times, that neither the Trustee nor the Debtor would pay any broker's commission or other compensation in connection with any sale of the Debtor's assets or any other plan of reorganization of the Debtor.

4. In view of the foregoing conclusion that petitioner was a volunteer with full warning, petitioner's petition for allowance of compensation must be denied, and it is not necessary to consider the remaining contentions made by the Trustee.

5. In any event, petitioner's alleged services were neither approved nor authorized by, nor brought to the attention of, the Court in these proceedings, and therefore no compensation may be allowed for any such services.

6. Petitioner is entitled to take nothing by his

petition in these proceedings, and the Trustee is entitled to recover his costs herein.

Now, therefore, in accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby Ordered, Adjudged and Decreed that the petition of Alex E. Wilson, the petitioner herein, for allowance of a real estate broker's commission be and the same is hereby denied, and no commission or other compensation whatsoever is allowed to petitioner herein.

Dated: February, 1955.

.....

United States District Judge.

Acknowledgment of Service Attached.

[Endorsed]: Lodged February 3, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

There having been filed in the above-entitled proceedings a petition by Alex E. Wilson for the allowance of a real estate broker's commission on a sale of certain assets pursuant to a plan of reorganization of the above-named Debtor; and Fred G. Stevenot, the Trustee herein, having filed herein his written objections to the allowance of any such commission; and said petition and objections having come on regularly for hearing before the above entitled Court, Honorable Oliver J. Carter presid-

ing, on the 21st day of June, 1954, the 6th day of July, 1954, and the 2nd day of August, 1954, Petitioner being represented at said hearing by his counsel, Clifton Hildebrand, Esq., and Messrs. Files & McMurchie, and the above-named Debtor being represented at said hearing by its counsel, Herbert Dudley, Esq., and the above-named Trustee being represented at said hearing by his counsel, Walter G. Olson, Esq., of the firm of Messrs. Orrick, Dahlquist, Herrington & Sutcliffe; and evidence, oral and documentary, having been introduced in support of said petition and in opposition thereto, and all parties interested having been heard; and the Court having heard and duly considered all the evidence and arguments of counsel and having considered the law and the facts, and being duly advised, now makes and files this, its Findings of Fact and Conclusions of Law.

Findings of Fact

The Court finds the following facts:

1. That during the period from July, 1952, to July, 1953, the Trustee in this matter became interested in selling all of the assets of the Debtor, Coastal Plywood & Timber Company, and during this time consulted with various real estate brokers regarding the sale of these assets. One of these real estate brokers was the Petitioner, Alex E. Wilson, who had been sent to the Trustee by Mr. Sterling Carr, one of the Attorneys for the Trustee.

2. That Petitioner was a duly licensed real estate broker.

3. That the Trustee encouraged Petitioner, and other real estate brokers, in their efforts to find a buyer for the assets of Debtor. That the Trustee co-operated with Petitioner in his efforts by enabling Petitioner to show the property to interested parties and by supplying Petitioner with timber cruises, financial statements and other information to assist him in finding a purchaser.

4. That Petitioner became quite active in the search for a prospective buyer, and devoted a good deal of his time, effort, and money in this search. Petitioner discussed his efforts at various times with the Trustee and with Mr. Sterling Carr, one of the attorneys for the Trustee, and submitted various letters to the Trustee discussing his efforts.

5. That Mr. Sterling Carr, one of the attorneys for the Trustee, encouraged Petitioner in continuing his efforts to find a purchaser for the assets of Debtor and assured Petitioner that the Court would protect him in his compensation if he sold these assets, and if his services were of benefit to this bankrupt estate.

6. That Petitioner did render services to the Debtor's estate by interesting William Steinberg, N. Sugarman, Barney Margolis, J. J. Sugarman Company, and others in the purchase of the assets of the Debtor, and in introducing these interested parties to the Trustee.

7. That on July 22, 1953, the Trustee received from William Steinberg an offer to purchase all of

the assets of Debtor for the sum of \$3,750,000.00. This letter, insofar as is material herein, was as follows:

“July 22, 1953”

“Coastal Plywood and Timber Company
and Fred G. Stevenot, Acting Trustee
for Coastal Plywood and Timber Company
300 Montgomery Street,
San Francisco, California

Re: No. 12223 United States District Court.
Gentlemen:

On behalf of J. J. Sugarman Co. of Los Angeles, California, I am authorized to make an offer of purchase for them of all of the assets of the Coastal Plywood and Timber Company, a corporation, upon the terms and conditions hereinafter set forth.

The Coastal Plywood and Timber Company, having filed its petition for an arrangement under the provisions of Chapter 11, shall assign, transfer and convey to J. J. Sugarman Co. all of its assets hereinafter described, so as to enable it to effectuate a plan for arrangement under said Chapter 11 as follows:

1. That the total purchase price is \$3,750,000.00 for all of the net assets of Coastal Plywood and Timber Company. * * *

That said Trustee did not accept said offer submitted by William Steinberg on behalf of J. J. Sugarman Company.

8. In October 1953, the Trustee entered into further negotiations with N. Sugarman and B. Mar-

golis for the sale of the assets of the Debtor to Sugarman Lumber Company. These negotiations with said Sugarman Lumber Company culminated in the presentation to the Trustee, on December 12, 1953, of an offer by Sugarman Lumber Company to purchase the assets of the Debtor. The offer of said Sugarman Lumber Company was thereafter incorporated by the Trustee as part of his Second Plan of Reorganization of the Debtor, filed on December 21, 1953.

9. On January 7, 1954, the Court entered its Order approving said Second Plan of Reorganization and directing that it be submitted to creditors and stockholders of the Debtor for their votes. On March 16, 1954, following the acceptance of said Plan in writing by more than two-thirds of each class of creditors of the Debtor and more than a majority of the stockholders of the Debtor, the Court entered its order confirming said Second Plan of Reorganization, as amended, and directed the Trustee to consummate said plan.

10. That said assets of Debtor were sold to Sugarman Lumber Company pursuant to said Second Plan of Reorganization as amended for the net sum of \$4,132,000.00.

11. That said sale of said assets and the efforts of Petitioner, Alex E. Wilson, in interesting N. Sugarman, B. Margolis and others in the purchase of said assets and in introducing these interested parties to the Trustee were of real benefit to the bankrupt estate.

12. That said services of Petitioner, Alex E. Wilson, in interesting N. Sugarman, B. Margolis, and others in the purchase of said assets, and in introducing these interested parties to the Trustee were accepted by the Trustee, and the Trustee continued to negotiate with N. Sugarman and B. Margolis until said sale to Sugarman Lumber Company was consummated as aforesaid.

13. That Sugarman Lumber Company re-sold a substantial portion of the assets so purchased by them pursuant to said Second Plan to Fred Holm and others at a substantial profit over the purchase price paid by Sugarman Lumber Company.

14. That Petitioner was instrumental in negotiating these resales by Sugarman Lumber Company, and that Sugarman Lumber Company would not have offered to purchase the assets of Debtor as aforesaid unless these resales had been negotiated by Petitioner.

15. That the Trustee on several occasions told the Petitioner that he would have to look to the Buyer for his commission.

16. That Petitioner protested orally that he could not be expected to represent the Buyer, and that he expected the Trustee to treat him fairly.

17. That on July 22, 1953, the same day that he received said offer from William Steinberg, on behalf of J. J. Sugarman Co., the Trustee mailed to Petitioner a letter which stated as follows:

"Dear Mr. Wilson:

"I wish to thank you for your letter of July 17th advising me of your current efforts to develop a plan of reorganization of Coastal Plywood & Timber Company.

"The plan of reorganization which I have filed with the Court has not yet been passed upon by Judge Lemmon, and I will receive and consider any proposals which you may desire to submit on behalf of your clients. Of course, any plan which you may submit should be of the nature contemplated by Chapter X of the Bankruptcy Act. Moreover, as I have previously advised you, neither I nor Coastal Plywood & Timber Company may be obligated for any commission payable in connection with such a plan, and any such commissions must be paid by the investors for whom you act."

Said letter stated for the first time in writing what the Trustee had previously stated verbally to Petitioner on various occasions.

18. That Petitioner was a mere volunteer who had been warned that the Trustee was unwaveringly opposed to paying a broker's commission to anyone, and who had been warned that he must obtain his compensation from the purchaser.

19. That Petitioner, Alex E. Wilson, did not obtain Court authorization for his services before rendering them, and the Trustee on several occasions told the Petitioner that the Bankrupt estate

could not pay a commission without Court authorization.

20. That Petitioner has not received any commission or compensation from anyone for his efforts in interesting N. Sugarman, Barney Margolis and Sugarman Lumber Company in the purchase of the assets of Debtor.

21. That there had been a prior partial sale to Clarence Nielson of some of the assets of the bankrupt estate in the nature of timber cutting rights for the total sum of \$100,000.00 which sale had been negotiated by the Petitioner under the same warning from the Trustee that Petitioner would have to look to the Buyer for his commission and that the bankrupt estate could not pay commission without prior court authorization. That the Trustee had asked the Court to approve the payment of a real estate commission to Petitioner, but that the Trustee had followed this procedure upon the instance of the Buyer. That this Court did approve the prior partial sale and the payment of a real estate commission to Petitioner in the sum of \$5,000.00 by its order of November 12, 1952. That said real estate commission was paid to Petitioner by a check of the Debtor, Coastal Plywood & Timber Company, from the proceeds of the sale.

Conclusions of Law

From the foregoing Findings of Fact, the Court concludes, as a matter of law, that:

1. Petitioner is not entitled to any real estate

broker's commission or any other compensation whatsoever from the Trustee or the estate of the Debtor herein.

2. Neither the Trustee nor the Debtor entered into or offered to enter into any contract or agreement or understanding, express or implied, with Petitioner for the employment of Petitioner as a real estate broker or agent or employee of the Trustee or the Debtor, and neither the Trustee nor the Debtor agreed or offered to pay to Petitioner any commission or other compensation in connection with any of the alleged services for which Petitioner seeks compensation.

3. Petitioner was, at best, a volunteer with full warning, at all times, that neither the Trustee nor the Debtor would pay any broker's commission or other compensation in connection with any sale of the Debtor's assets or any other plan of reorganization of the Debtor.

4. In view of the foregoing conclusion that Petitioner was a volunteer with full warning, Petitioner's petition for allowance of compensation must be denied, and it is not necessary to consider the remaining contentions made by the Trustee.

5. In any event, Petitioner's alleged services were neither approved nor authorized by, nor brought to the attention of, the Court in these proceedings, and therefore no compensation may be allowed for any such services.

6. Petitioner is entitled to take nothing by his

petition in these proceedings, and the Trustee is entitled to recover his costs herein.

Dated: February, 1955.

.....

United States District Judge.

[Endorsed]: Lodged February 7, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR
FURTHER CONSIDERATION, FOR OR-
DER THAT NO JUDGMENT HAS BEEN
ENTERED, TO VACATE JUDGMENT, TO
SETTLE FINDINGS, AND TO ENTER
JUDGMENT

To: Coastal Plywood & Timber Company, Debtor corporation, and Herbert E. Dudley, its attorney, and to Fred G. Stevenot, Trustee, and Orrick, Dahlquist, Herrington & Sutcliffe, his attorneys; and each thereof:

You, and each of you, will please take notice that on Monday, January 9, 1956, at the hour of 10:00 o'clock a.m., in the Courtroom of the Honorable Judge Oliver J. Carter in the Post Office Building, 7th and Mission Streets, City of San Francisco, State of California, the Petitioner, Alex E. Wilson, will move the Court as follows:

(1) for further consideration and argument of this matter on the basis of recent decisions rendered since the trial of this matter as set forth in the

Memorandum of October 18, 1955, and subsequent letters;

(2) for its Order that the filing of the Memorandum and Order of January 26, 1955, did not constitute an entry of Judgment in this matter;

(3) for its Order Vacating any Judgment that may have been entered in this matter under Rule 60(b), Federal Rules of Civil Procedure, on the grounds of mistake, inadvertance, surprise or excusable neglect;

(4) for a settlement of the Findings of Fact and Conclusions of Law which have been lodged with the Court under Rule 5, Rules of Practice;

(5) for the entry of Judgment in this matter.

Said motion will be made on the following grounds:

(1) That no judgment has been entered in this matter, and that this matter is now pending before this Court. That recent decisions, rendered since the trial of this matter which have a direct bearing on the issues involved in this case, have come to Petitioner's attention as set forth in the Memorandum of October 18, 1955, and subsequent letters. Petitioner desires to bring said cases to the attention of the Court prior to its decision in this matter.

(2) That on January 26, 1955, the Court filed a Memorandum and Order wherein counsel for the trustee was directed to prepare findings, conclusions and an order in conformity therewith. That attorneys for the trustee in their letter to the Court

dated October 28, 1955, contend that said Memorandum and Order constituted the entry of Judgment in this matter. That this contention is disputed by your Petitioner, and is not in accord with the records and files in this action, and is not in accord with Rule 5(d), Rules of Practice, District Court of the United States, Northern District of California. That your Petitioner seeks an order that no judgment has been entered.

(3) That in the event the Court should determine that the filing of the Memorandum and Order of January 26, 1955, did constitute an entry of Judgment, that said entry of Judgment be set aside under Rule 60(b), Federal Rules of Practice and Procedure, on the grounds of mistake, inadvertence, surprise or excusable neglect, as shown by Petitioner's letter of November 3, 1955, and the Affidavit filed herewith.

(4) That on February 3, 1955, attorneys for the trustee lodged formal Findings of Fact and Conclusions of Law under said Rule 5(d). That on February 7, 1955, attorneys for Petitioner lodged Alternative Findings of Fact and Conclusions of Law under said Rule 5(d). That said Findings of Fact and Conclusions of Law have never been settled by the Court as provided for in said Rule 5(d).

(5) That on February 8, 1955, attorneys for the Trustee lodged with the Court under Rule 5(d) a formal Judgment and Order. That no formal Judgment or Order has been signed or filed by the Court in this matter, and no Judgment has been entered.

Each of said motions will be based on this Notice of Motion, the Affidavit of Donald W. McMurchie, served herewith, all letters written to the Court, additional Authorities to be cited on the hearing of this motion, and upon all records, papers and files in this action.

Dated: December 23, 1955.

FILES & McMURCHIE,
/s/ By DONALD W. McMURCHIE,
Attorneys for Petitioner.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 23, 1955.

[Title of District Court and Cause.]

**AFFIDAVIT IN SUPPORT OF MOTION FOR
FURTHER CONSIDERATION, FOR OR-
DER THAT NO JUDGMENT HAS BEEN
ENTERED, TO VACATE JUDGMENT, TO
SETTLE FINDINGS, AND TO ENTER
JUDGMENT**

State of California
County of Sacramento—ss.

Donald W. McMurchie, being first duly sworn, deposes and says: That he is one of the Attorneys for Petitioner in the above entitled matter; that since the trial of this matter decisions having a direct bearing on the issues involved in this case have come to the attention of Petitioner. That among these cases are the cases of Palmer vs.

Wahler 133 ACA 932 (Advance Sheets for July 1, 1955); and the case of Desny vs. Wilder 134 ACA 442 (Advance Sheets of July 29, 1955). That these cases, together with other authorities have been presented to the Court by way of a Memorandum filed October 18, 1955, and by a letter to the Court dated December 9, 1955. That Petitioner also have additional Authorities which they desire to call to the attention of the Court by way of oral argument.

That by a letter to the Court from the Attorneys for the Trustee dated October 28, 1955, the Trustee raises the contention that the Memorandum and Order filed by the Court on January 26, 1955, constituted an Entry of Judgment under Rule 58 of the Federal Rules. That Attorneys for Petitioner dispute this contention as set forth by their letter to the Court dated November 3, 1955.

That this order of January 26, 1955, specifically provides in the last paragraph thereof as follows:

“Counsel for the Trustee is directed to prepare Findings, Conclusions and an Order in conformity herewith.”

That this is a clear statement by the Court that this Memorandum and Order was not the judgment of the Court but that formal Findings and Conclusions and a formal order were to be prepared and submitted to the Court for signature.

That shortly after the filing of this Memorandum and Order Affiant inquired of the Court in a telephone conversation as to whether said Memorandum

and Order could, in any way, be construed as a judgment under Rule 58, Federal Rules of Civil Procedure. Counsel was informed that it was not the Court's intention to enter judgment upon the filing of this Memorandum, and that this intention was made clear by the provision of the Memorandum above quoted directing preparation of formal Findings and Conclusions and a formal order to be submitted to the Court. That your Affiant also talked with the Clerk of the Court in regard to the effect of the filing of this Memorandum and Order of January 26, 1955, and was informed by the Clerk that it did not constitute the judgment in this matter and that judgment could be entered only after the Court had settled and signed formal Findings of Fact and Conclusions of Law and had signed a formal judgment pursuant to Rule 5(d) of the Rules of Practice.

That upon the filing of this Memorandum and Order the Clerk entered a notation upon the Civil Docket as follows:

“Order Judgment be awarded to Trustee with costs upon Findings of Fact and Conclusions of Law and Order.”

That this notation does not constitute an entry of Judgment, but clearly provides that judgment will be entered only upon Findings of Fact and Conclusions of Law and Order. That the Clerk has not served a Notice of Entry of Judgment as required by Section 77(e) of the Federal Rules of Civil Procedure, and Attorneys for the Pettitioner have never

received a Notice of Entry of Judgment from any source.

That on February 3, 1955, Attorneys for the Trustee submitted to the Court for signature formal and extensive Findings of Fact and Conclusions of Law. These Findings were first submitted to your affiant for approval as to form as provided in Rule 5(d) Rules of Practice, District Court of the United States, Northern District of California. That your affiant refused to approve these Findings as provided in Rule 5(d). That on February 7, 1955, Attorneys for Petitioner lodged alternative Findings of Fact and Conclusions of Law as provided in Rule 5(d). That on February 8, 1955, Attorneys for the Trustee mailed to the Court a formal Judgment and Order and directed that said Judgment and Order be lodged with the Court under Rule 5(d). That no further hearings have been had in this matter, that Findings of Fact and Conclusions of Law have not been settled or signed by the Court and that no judgment has been signed or filed by the Court.

That your affiant was not aware of any contention by any party that the Memorandum of January 26, 1955, constituted an entry of Judgment in this matter until receipt of a copy of a letter from Attorneys for the Trustee dated October 28, 1955, in which this contention was first raised.

That the action of all parties to this proceeding prior to October 28, 1955, was consistent only with the belief of your affiant that no judgment had been

entered. Findings of Fact and Conclusions of Law and a formal Judgment had been lodged with the Court under Rule 5(d), Rules of Practice, Northern District of California, by both parties. Memorandums of Points and Authorities had been filed by both parties in support of their respective proposed Findings of Fact, and affiant was informed and believed that no Judgment could be entered until these Findings had been settled by the Court as required by Rule 5(d).

That Petitioner contends that the filing of the Memorandum and Order of January 26, 1955, did not constitute an Entry of Judgment. If said Memorandum and Order did constitute entry of judgment, then judgment has been entered by mistake, and due to the inadvertence, surprise and excusable neglect of Attorneys for Petitioner as shown by this affidavit, and any such entry of judgment should be vacated and set aside under Rule 60(b), Federal Rules of Civil Procedure, in order that the time for new trial motion and appeal can begin running from a new date of entry of judgment and in order that Attorneys for Petitioner may protect the rights of their client and may be notified of the date upon which Judgment is entered.

Wherefore your affiant prays that this Court enter its Orders as requested in the Notice of Motion and Motion which has been filed herewith.

FILES & McMURCHIE,
/s/ By DONALD W. McMURCHIE,
Attorneys for Petitioner.

Subscribed and sworn to before me this 23rd day of December, 1955.

[Seal] /s/ THOMAS T. FILES,
Notary Public in and for said County and State.

[Endorsed]: Filed December 23, 1955.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES ON NOTICE OF MOTION

Rule 7(b), Federal Rules of Civil Procedure.

Rule 52, Federal Rules of Civil Procedure.

Rule 58, Federal Rules of Civil Procedure.

Rule 60, Federal Rules of Civil Procedure.

Rule 5, Rules of Practice, District Court of the United States, Northern District of California.

For the proposition that until a Judgment is entered it is under the control of the Court and may be altered, changed or another judgment substituted therefor different from that first announced:

Phillips vs. Phillips, 41 Cal. App. (2d) 869, 873.

DeCoe vs. Johnson, 54 Cal. App. 592, 604.

Healy vs. Pennsylvania R.R., 181 Fed. (2d) 934.

For the proposition that a Judgment entered by mistake, inadvertence, surprise or excusable neglect should be vacated by the Court in order to again

commence running of time for new trial motion and appeal:

Commercial Credit Corp. vs. U. S., 175 Fed. (2d) 905.

Dated: December 23, 1955.

Respectfully submitted,

FILES & McMURCHIE,
/s/ By DONALD W. McMURCHIE.

[Endorsed]: Filed December 23, 1955.

[Title of District Court and Cause.]

MEMORANDUM ON MOTION FOR RECONSIDERATION

Petitioner seeks reconsideration of the Court's memorandum and order disallowing his claim for a real estate commission against the debtor estate. He asks the Court either to imply a contract from the conduct of the trustee, or to permit him to recover in quasi-contract for the reasonable value of his services.

The answer to the request to find an implied contract is found in the facts, which will not permit the implication of a contract as shown in the previous memorandum. The thrust of petitioner's argument is that the conduct of the trustee is the basis for implying a contract. The Court has found and petitioner admits that the trustee expressly declared that the estate would not pay petitioner a commission. This precludes the declaration of a

contract by implication because it negatives conduct from which a contract could be implied as a matter of fact.

In support of this theory of recovery, petitioner relies heavily upon the recent California case of *Desney v. Wilder*, 46 C. 2d 715. The facts of the *Desney* case invited the court to discuss at length the law of implied-in-fact contracts in California. Citing many authorities, the court merely reaffirmed the principle that the parties may incur contractual obligations by their conduct as well as express words, if their conduct is consistent with an unspoken agreement.

Petitioner places most emphasis on the contention that he is entitled to recover in quasi-contract. His brief contains extracts from many discussions upon this theory of recovery, the substance of which is this: When one person has rendered services which have accrued to the benefit of another, the law raises an implied promise to pay for them upon the equitable principle that one person should not be unjustly enriched by another's labors. The promise implied here is fictitious, and is imposed by law without reference to, and sometimes in frustration of their intention.

27 Cal. Jur. 198, 199; 5 Cal. Jur. (2d) 528; 7 Corpus Juris Secundum 111; 12 Am. Jur. 502; 12 Cal. Jur. (2d) 191; 5 Cal. Jur. (2d) 526.

Because these authorities emphasize that the doctrine is grounded upon equitable principles, the petitioner's brief contains many authorities demon-

strating that the Court of Bankruptcy has "equitable powers of a wide sweep" in passing upon the allowance and disallowance of claims. It is significant, however, that none of the bankruptcy cases cited were dealing with a recovery based upon the theory of quasi-contract.

Defendant also urges application of a line of cases which support a quasi-contractual recovery for services rendered whenever the defendant has made material representations to the plaintiff inducing the services, whether the representations were knowingly false or innocent. (Rest. of Restitution §40.)

This argument is asserted upon the basis of the trustee's conduct in the Nielson transaction coupled with Carr's statements as constituting a representation that Wilson would be paid by the trustee. It, therefore, assumes:

1. That Wilson was justified in believing, by reason of those representations, that trustee would pay him despite what trustee had said;
2. That such belief was what induced him to search out and bring the buyer to the seller; and
3. That Carr's representations were binding on the trustee. It is doubtful that they are.

Recently the case of *Newport v. Sampsell*, 233 F. (2d) 944, (C. A. 9, June 5, 1956), passed upon the ability of a trustee in bankruptcy to estop the estate by his representations, and the court said:

"But the difficulty is that the trustee draws

his power from the roots of the Bankruptcy Act. His powers are limited. 11 U.S.C.A. §75. It is not for him to estop an estate, and thereby creditors, out of a substantial part of its assets.”

If the estate could not be bound, or estopped by the representations of the trustee, it would seem that a fortiori, his agent would be unable to do so.

In support of his quasi-contractual theory generally, without alluding to the representations made, petitioner also relies heavily upon Irving-Austin Bldg. Corp., 100 F. (2d) 574. This decision contains a statement which lends itself to petitioner's claim, to-wit:

“Benefit to the estate, and the amount of the benefit, are the criteria by which the value of such services should be measured, where no employment by the Court or Trustee exists.”

It loses its impact, however, upon the discovery that the court is talking about allowable compensation to attorneys for creditors in a bankruptcy proceeding, which compensation is expressly provided for by 11 U.S.C.A. §643 (Chapter on Bankruptcy, Reorganizations, Attorneys for Creditors). The case is perhaps good authority for measuring allowable compensation for one who has benefited the bankrupt estate but does not purport to define under what circumstances a claimant may recover compensation from a bankrupt estate.

The bulk of the petitioner's argument for a re-

consideration is devoted to the contention that the Court should permit him recovery in quasi-contract for services rendered; all the authorities agree that quasi-contract is grounded upon equitable principles; ultimately then, the merit of the petitioner's argument comes to rest upon this: Should his claim, in good conscience, and because of the great benefit he conferred upon the estate, be allowed?

Here, again, the facts preclude a favorable answer to petitioner. When petitioner performed the services for the estate he knew of the trustee's announced policy that the estate would not pay any real estate commission. He knew that he was expected to get his commission from the buyer, which he tried to do before making a claim against the estate. This places the petitioner in the position of being a volunteer rather than one who has innocently rendered services in the good faith belief that he would be compensated for those services. From the very beginning of his dealings with the estate petitioner was on notice that the estate would not pay a commission. Although he says he did not accept the trustee's statement in this respect, and that he relied on subsequent conduct of the trustee, the attorney for the trustee and the estate, petitioner by his admitted attempts to secure his commission from the buyer, shows that he performed services for the estate as a volunteer, and not in reliance upon the duty of the estate to pay for the reasonable value of the services rendered.

The motion to reconsider is denied.

Dated: March 14, 1957.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed March 14, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW AND ORDER DENYING CLAIM OF
ALEX E. WILSON

There having been filed in the above-entitled proceedings a petition by Alex E. Wilson for the allowance of a real estate broker's commission on a sale of certain assets pursuant to a plan of reorganization of the above-named Debtor; and Fred G. Stevenot, the Trustee herein, having filed herein his written objections to the allowance of any such commission; and said petition and objections having come on regularly for hearing before the above entitled Court, Honorable Oliver J. Carter presiding, on the 21st day of June, 1954, the 6th day of July, 1954 and the 2nd day of August, 1954, petitioner being represented at said hearing by his counsel, Clifton Hildebrand, Esq., and Messrs. Files & McMurchie, and the above-named Debtor being represented at said hearing by its counsel, Herbert Dudley, Esq., and the above-named Trustee being represented at said hearing by his counsel, Walter G. Olson, Esq., of the firm of Messrs. Orrick, Dahlquist, Herrington & Sutcliffe; and evidence, oral and documentary, having been introduced in sup-

port of said petition and in opposition thereto, and all parties interested having been heard; and the Court having heard and duly considered all the evidence and arguments of counsel and having considered the law and the facts, and being duly advised, now makes and files this, its Findings of Fact and Conclusions of Law.

Findings of Fact

The Court finds the following facts:

1. Petitioner's first contact with either the Debtor or the Trustee occurred in July, 1952, when he called upon the Trustee and stated to the Trustee that he had a buyer for certain timber contracts then owned by the Debtor. The Trustee advised petitioner that he was endeavoring to negotiate changes in these contracts which would enable the Debtor to take advantage of these contracts. The Trustee informed petitioner that in the event he determined that these contracts should be sold, neither the Trustee nor the Debtor would pay any commission on the sale and that any compensation to petitioner would have to be paid by the buyer of the contracts.

2. On August 19, 1952, Clarence L. Nielson submitted to the Trustee a proposal for the purchase of said contracts, which proposal was conditioned upon said Clarence L. Nielson being able to negotiate changes in said contracts satisfactory to him. This proposal was prepared by petitioner for said Clarence L. Nielson on the letterhead of petitioner. Said Clarence L. Nielson was not successful in nego-

tiating the desired changes in the contracts and the Trustee therefore did not submit said proposal to the Court for approval. Thereafter, said Clarence L. Nielson and Amy K. Nielson, his wife, presented to the Trustee a new offer, dated October 11, 1952, to purchase said contracts for a gross price of \$100,000, which offer was subject to the express condition that the sum of \$5,000 be paid to petitioner out of such gross price. Following receipt of this offer, the Trustee and his counsel conferred with the said Nielsons and petitioner, at which time the Trustee objected to the condition imposed in the offer that petitioner be paid \$5,000 out of the gross price, and endeavored to induce the said Nielsons to eliminate this condition. The said Nielsons, however, refused to eliminate this condition and insisted that \$5,000 be paid to petitioner and that the offer be accepted immediately in the form submitted in order to avoid any further delay. The Trustee thereupon agreed to submit the offer of the said Nielsons to the Court, and thereafter filed a petition in these proceedings presenting said offer to this Court. In said petition, the Trustee fully advised this Court and all interested parties that said offer was conditioned upon the payment to petitioner of \$5,000 of the proceeds of said sale. Thereafter, on November 3, 1952, a hearing on said petition of the Trustee was held before the Court following notice to all creditors and stockholders of the Debtor, and on November 12, 1952, the Court issued its Order approving said offer of Clarence L. Nielson and his wife and authorizing the Trustee

to consummate the sale in accordance with the terms of said offer.

3. Petitioner represented and acted on behalf of the said Nielsons in the above-described transaction and did not represent the Trustee or the Debtor. On August 9, 1952, prior to the sale of said contracts, the said Nielsons had entered into an agreement with petitioner in which they agreed to require the Debtor to pay petitioner's "costs" in connection with said sale, and further agreed to pay petitioner a brokerage fee for procuring said contracts for them. Pursuant to said agreement, the said Nielsons inserted in their offer to the Trustee the aforesaid condition that \$5,000 be paid to petitioner from the proceeds of the sale, and petitioner received said sum from said proceeds solely because of said condition. In addition, petitioner negotiated a loan on behalf of the said Nielsons, the proceeds of which were used to purchase said contracts of the Debtor.

4. During the period from July, 1952 to July, 1953 the Trustee endeavored to develop a plan of reorganization of the Debtor which would not involve the disposition of any assets of the Debtor and which would preserve for the stockholders their interest in the Debtor's business and properties. On June 15, 1953, the Trustee filed herein his First Plan of Reorganization of the Debtor, which Plan did not contemplate the sale of any assets of the Debtor but, rather, contemplated the retention of all of its properties, the sale of additional shares

of capital stock and the creation of a voting trust for the protection of creditors. In July, 1953, the Reconstruction Finance Corporation, the principal creditor of the Debtor, notified the Trustee that it would not accept said Plan and the Trustee then, for the first time, determined that it was necessary to sell the assets of the Debtor to avert foreclosure.

5. During the period from July, 1952 to July, 1953 a number of persons, including petitioner, called upon the Trustee and indicated that they were considering the development of a proposal or plan of reorganization of the Debtor. The Trustee furnished all such persons, including petitioner, with information concerning the Debtor and its properties and permitted them to inspect such properties. Petitioner was expressly informed by the Trustee, during said period from July, 1952 to July, 1953, that the Trustee was not interested in a sale of the Debtor's properties but was endeavoring to develop a plan of reorganization which would preserve for the Debtor's stockholders a participation in such properties and their operation. Moreover, the Trustee repeatedly notified the petitioner during said period that neither the Trustee nor the Debtor would employ any broker or pay any commission in connection with any plan of reorganization, and that if petitioner endeavored to develop any plan, the must represent, and be compensated by, the proponents of such plan. Petitioner was further advised by the Trustee, on several occasions, that neither the Debtor nor the Trustee could pay

a commission to petitioner without prior Court authorization and that petitioner would have to look to the buyer for his commission. During the latter part of 1952 and during 1953, petitioner called at the offices of the Trustee at various times, without invitation from the Trustee, and on such occasions the Trustee repeatedly and unequivocally notified petitioner that no broker would be employed or compensated by the Trustee or the Debtor.

6. On July 22, 1953, petitioner received from the Trustee a letter, which stated, insofar as is material here, as follows:

“The plan of reorganization which I have filed with the Court has not yet been passed upon by Judge Lemmon, and I will receive and consider any proposals which you may desire to submit on behalf of your clients. Of course, any plan which you may submit should be of the nature contemplated by Chapter X of the Bankruptcy Act. Moreover, as I have previously advised you, neither I nor Coastal Plywood & Timber Company may be obligated for any commissions payable in connection with such a plan, and any such commissions must be paid by the investors for whom you act.”

Said letter stated only what the Trustee had previously repeated verbally to the petitioner on numerous occasions over a long period of time. Shortly after July 22, 1953, petitioner called at the Trustee's office and acknowledged receipt of said letter but voiced no objection thereto.

7. On July 23, 1953 or July 24, 1953, the Trustee received from William Steinberg an offer, purportedly on behalf of J. J. Sugarman Co. of Los Angeles, California, to purchase all of the assets of the Debtor for the sum of \$3,750,000. At the time the Trustee received said offer, petitioner and said Steinberg advised the Trustee that petitioner was being compensated by said Steinberg. The Trustee refused to consider said offer submitted by said Steinberg and advised said Steinberg that he would require an offer of at least \$4,250,000. Thereupon, J. J. Sugarman Co. advised said Steinberg that it was not interested in a purchase of the assets of the Debtor, and said Steinberg began representing a Mr. Jamieson, who also evidenced an interest in a purchase of the assets of the Debtor. Said Steinberg represented said Jamieson from August 15, 1953 through the first week in October, 1953.

8. In connection with his representation of J. J. Sugarman Co. and, subsequently, Mr. Jamieson, said Steinberg obtained an offer from a Mr. Holm to repurchase a portion of the Debtor's timber from his clients. Mr. Holm was introduced to said Steinberg by petitioner.

9. On July 22, 1953, said Steinberg entered into an oral agreement with petitioner, which agreement was confirmed by said Steinberg by a letter to petitioner dated August 25, 1953, whereby said Steinberg agreed to pay petitioner \$25,000 for petitioner's services in bringing the Debtor to his attention. Peti-

tioner has also entered into an agreement with Mr. Holm, one of the ultimate purchasers of a portion of the Debtor's properties, whereby said Holm is to receive a portion of any amount which petitioner might recover from the Debtor on the claim herein denied.

10. In October, 1953, the Trustee entered into negotiations with N. Sugarman and B. Margolis for the sale of assets of the Debtor to Sugarman Lumber Company. The Trustee engaged in extensive negotiations with said Sugarman Lumber Company, which culminated in the presentation to the Trustee on December 12, 1953 of an offer by Sugarman Lumber Company to purchase the assets of the Debtor. The offer of said Sugarman Lumber Company was thereafter incorporated by the Trustee as part of his Second Plan of Reorganization of the Debtor, filed on December 21, 1953.

11. On January 7, 1954, the Court entered its Order approving said Second Plan of Reorganization and directing that it be submitted to creditors and stockholders of the Debtor for their votes. On March 16, 1954, following the acceptance of said Plan in writing by more than two-thirds of each class of creditors of the Debtor and more than a majority of the stockholders of the Debtor, the Court entered its Order confirming said Second Plan of Reorganization, as amended, and directed the Trustee to consummate said Plan. On April 16, 1954, the Trustee, pursuant to said Order, conveyed the assets of the Debtor to said Sugarman

Lumber Company pursuant to said Second Plan of Reorganization, and, prior to the filing of petitioner's petition herein, the Trustee had taken substantially all of the remaining steps required for the consummation of said Plan. Said Sugarman Lumber Company resold a substantial portion of the assets purchased pursuant to said Plan to the aforesaid Mr. Holm and also resold portions of said assets to persons with whom the said Steinberg had previously negotiated.

12. Said sale of said assets and the efforts of Petitioner in interesting N. Sugarman, B. Margolis and others in the purchase of said assets and in introducing these interested parties to Trustee were of real benefit to the bankrupt estate.

13. Petitioner was instrumental in negotiating the resales by Sugarman Lumber Company, and Suger Lumber Company would not have offered to purchase the assets of Debtor as aforesaid unless these resales had been negotiated by Petitioner.

14. Petitioner was clearly and unequivocally notified by Trustee, both verbally and in writing, before and repeatedly during the period of the alleged services for which petitioner seeks compensation, that neither the Debtor nor the Trustee would employ any broker or agent or pay any commission or compensation to any agent in connection with any plan or reorganization or sale. Trustee on several occasions told Petitioner he would have to look to Buyer for his commission. Petitioner protested orally that he could not be expected to

represent Buyer, and that he expected Trustee to treat him fairly. Petitioner never requested the Trustee to employ him as a broker, and never advised the Trustee that he expected or would seek compensation from the Debtor or the Trustee until May, 1954, after said Second Plan of Reorganization, including the sale to said Sugarman Lumber Company, had been consummated.

15. Neither the Second Plan of Reorganization nor any other instrument filed with the Court prior to the filing of petitioner's petition herein disclosed to the Court or to the creditors and stockholders of the Debtor that a commission or other compensation might be payable to petitioner or any other broker in connection with said Second Plan of Reorganization, or the sale to said Sugarman Lumber Company contemplated therein. The Court and the creditors and the stockholders of the Debtor were never advised, prior to the filing of petitioner's petition herein, that petitioner expected to receive a commission or other compensation from the Debtor. The Court approved and confirmed said Second Plan of Reorganization, and the creditors and stockholders of the Debtor submitted their binding acceptances of said Second Plan of Reorganization, in complete ignorance of the claim upon which petitioner now seeks to recover.

16. The Trustee relied upon his understanding with petitioner that petitioner was not representing the Trustee or the Debtor and would not receive

any compensation from the Trustee or the Debtor, in presenting said Second Plan of Reorganization to the Court and to the creditors and stockholders of the Debtor for approval, and in consummating said Second Plan of Reorganization following such approval.

Conclusions of Law

From the foregoing Findings of Fact, the Court concludes, as a matter of law, that:

1. Petitioner is not entitled to any real estate broker's commission or any other compensation whatsoever from the Trustee or the estate of the Debtor herein.

2. Neither the Trustee nor the Debtor entered into or offered to enter into any contract or agreement or understanding, express or implied, with petitioner for the employment of petitioner as a real estate broker or agent or employee of the Trustee or the Debtor, and neither the Trustee nor the Debtor agreed or offered to pay to petitioner any commission or other compensation in connection with any of the alleged services for which petitioner seeks compensation.

3. Petitioner was, at best, a volunteer with full warning, at all times, that neither the Trustee nor the Debtor would pay any broker's commission or other compensation in connection with any sale of the Debtor's assets or any other plan of reorganization of the Debtor.

4. In view of the foregoing conclusion that petitioner was a volunteer with full warning, peti-

tioner's petition for allowance of compensation must be denied, and it is not necessary to consider the remaining contentions made by the Trustee.

5. In any event, petitioner's alleged services were neither approved nor authorized by, nor brought to the attention of, the Court in these proceedings, and therefore no compensation may be allowed for any such services.

6. Petitioner is entitled to take nothing by his petition in these proceedings, and the Trustee is entitled to recover his costs herein.

Now, Therefore, in accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby Ordered, Adjudged and Decreed that the petition of Alex E. Wilson, the petitioner herein, for allowance of a real estate broker's commission be and the same is hereby denied, and no commission or other compensation whatsoever is allowed to petitioner herein.

Dated: March 19, 1957.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed March 19, 1957.

In The United States District Court, Northern
District of California, Northern Division

No. 12223

In the Matter of
COASTAL PLYWOOD & TIMBER COMPANY,
a corporation, Debtor.

In Proceedings for the Reorganization of a Corporation.

JUDGMENT AND ORDER

There have been filed in the above-entitled proceedings a petition by Alex E. Wilson for the allowance of a real estate broker's commission on a sale of certain assets pursuant to a plan of reorganization of the above-named Debtor; and Fred G. Stevenot, the Trustee herein, having filed herein his written objections to the allowance of any such commission; and said petition and objections having come on regularly for hearing before the above entitled Court, Honorable Oliver J. Carter presiding, on the 21st day of June, 1954, the 6th day of July, 1954 and the 2nd day of August, 1954, petitioner being represented at said hearing by his counsel, Clifton Hildebrand, Esq., and Messrs. Files & McMurchie, and the above-named Debtor being represented at said hearing by its counsel, Herbert Dudley, Esq., and the above-named Trustee being represented at said hearing by his counsel, Walter G. Olson, Esq., of the firm of Messrs. Orrick, Dahlquist, Herrington & Sutcliffe; and evidence, oral

and documentary, having been introduced in support of said petition and in opposition thereto, and all parties interested having been heard; and the Court having made and filed its Findings of Fact and Conclusions of Law and having determined that the petitioner is not entitled to any allowance of compensation from the estate of the Debtor herein,

It Is Hereby Ordered, Adjudged and Decreed as follows:

I.

That the petition of Alex E. Wilson, the petitioner herein, for allowance of a real estate broker's commission be and the same is hereby denied.

II.

That Alex E. Wilson, the petitioner herein, be allowed no commission or other compensation whatsoever from the estate of Coastal Plywood & Timber Company, the Debtor herein.

III.

That Fred G. Stevenot, the Trust of the Debtor herein, recover from petitioner his costs and taxable disbursements herein.

Dated: March 19, 1957.

/s/ OLIVER J. CARTER,

United States District Judge.

Approved as to Form, as Provided in Rule 5 (d).

/s/ DONALD M. McMURCHIE,

Attorney for Petitioner.

Entered In Civil Docket March 20, 1957.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Alex E. Wilson, petitioner in the above entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 20, 1957.

Dated: April 15, 1957.

FILES & McMURCHIE,
/s/ By DONALD W. McMURCHIE,
Attorneys for Petitioner.

[Endorsed]: Filed April 15, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON AP- PEAL

Comes now Alex E. Wilson, Petitioner, by and through his attorneys, Files & McMurchie, and files herein his Statement of Points Upon Which Appellant Intends to Rely On Appeal.

I.

That the District Court erred in not finding that Petitioner should be allowed a reasonable compensation for his services rendered to the Debtor in this reorganization proceeding at the specific instance and request of Trustee, which services were accepted

by the Trustee and admittedly of great benefit to the Debtors estate.

II.

That the District Court erred in not finding an implied in fact contract between Petitioner and the Trustee of the Debtors estate to pay petitioner a real estate brokers commission for his services in finding a buyer who purchased the assets of Debtors estate for the gross sum of approximately Four Million Three Hundred Fifty-Two Thousand (\$4,352,000.00) Dollars, which services were accepted by the Trustee and admittedly of great benefit to the Debtors estate.

III.

That the District Court erred in not finding an implied in law or quasi contract between Petitioner and the Trustee of Debtor as a matter of equity to pay the reasonable value of services rendered to Debtors estate which were accepted by the Trustee and admittedly of great benefit to Debtors estate, irrespective of the intent of the Trustee.

IV.

That the District Court erred in not finding that the District Court sitting in bankruptcy by virtue of its inherent equitable powers and as a matter of sound public policy should award compensation to Petitioner for valuable services rendered to, accepted by and of great benefit to Debtors estate.

V.

The District Court erred in not finding an express

contract or implied in fact contract between Petitioner and Debtors estate based upon the assurances by Sterling Carr, attorney for the Trustee and agent of Debtors estate, that Petitioner would be paid a real estate brokers commission if he found a purchaser for the assets of Debtors estate.

VI.

The District Court erred in not finding that the representations of Sterling Carr, attorney for the Trustee, who assured Petitioner that he would be paid if he found a purchaser for the assets of Debtors estate, were binding on Trustee and on Debtors estate.

VII.

That District Court erred in refusing to compensate Petitioner as a matter of equity for valuable services rendered to and accepted by Debtors estate, particularly since Petitioner was encouraged to proceed and promised compensation therefor by the Trustee and by an agent of the Trustee.

VIII.

That District Court erred in finding that Petitioner was to obtain his brokerage commission from Buyer for the said sale of the assets of the Debtors estate.

IX.

The District Court erred in not finding that Petitioner negotiated a resale of the assets for the buyer, after he had produced the said buyer who purchased the assets from the Debtors estate; and that

any compensation that may have been sought from the buyer himself, if any, was related to the said resale transaction of the same assets for and on behalf of buyer, and not for services rendered to Debtors estate.

X.

The District Court erred in not finding that Petitioner reasonably relied upon the Nielson transaction, which was a prior sale of similar assets of the same Debtors estate, under similar circumstances, and for which Petitioner was paid a brokerage commission in the sum of Five Thousand (\$5,000.00) Dollars by a check of the Debtors estate; and in not finding that by virtue thereof Petitioner proceeded to find a buyer of the remaining assets of Debtors estate, in good conscience and in good faith, believing he would be similarly compensated.

XI.

The District Court erred in not estopping Trustee from refusing payment of a brokerage commission to Petitioner, in view of the fact that Trustee paid Petitioner under similar circumstances in the Nielson transaction, on which Petitioner reasonably relied and rendered his services and incurring expense to find the buyer of the said assets and as a result thereof reasonably expected compensation therefor.

XII.

The Trial Court erred in finding Petitioner was a volunteer.

XIII.

The Trial Court erred in not finding that Petitioner expended a great deal of effort and incurred a great deal of expense in producing a buyer of the Debtors estate, and that in so doing he acted in good faith and reasonably believed, because of the Nielson transaction and the representations of the Trustee and by his attorney and agent, that he would be compensated for his services.

XIV.

That the evidence does not support the Findings of Fact and Conclusions of Law made and entered by the District Court.

XV.

That the Findings of Fact do not support the Conclusions of Law or the Order Denying Claim made and entered by the District Court.

XVI.

That the District Court erred in not making full and complete Findings of Fact relative to all material matters put into evidence at the trial of this action.

XVII.

That the Order Denying Compensation made and entered by the District Court is not supported by the law and the evidence at the trial.

XVIII.

That by reason of the law and evidence Petitioner is entitled to a Judgment for a real estate brokers

commission, and for reasonable compensation for services rendered to Debtors estate which were of great benefit to Debtors estate.

Dated: May, 1957.

FILES & McMURCHIE,

By

Attorneys for Petitioner.

[Endorsed]: Filed May 14, 1957.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now Alex E. Wilson, Petitioner and Appellant, by and through his attorneys, Files & McMurchie, and hereby designates the following documents and matters to be printed as a material portion of the Record on Appeal:

1. Petition for Allowance of Real Estate Brokers Commission.
2. Order Fixing Hearing for Consideration of Petition for Allowance of Real Estate Brokers Commission.
3. Notice of Petition for Allowance of Real Estate Brokers Commission.
4. Objections by Trustee to Allowance of Real Estate Brokers Commission.
5. Affidavit of Trustee in Opposition to Petition for Allowance of Real Estate Brokers Commission.

6. A Reporters Transcript Containing All Evidence and the Proceedings at the Trial or Hearing.

7. Memorandum and Order—January 26, 1955.

8. Proposed Judgment and Order Lodged by Trustee.

9. Proposed Findings of Fact and Conclusions of Law Lodged by Trustee.

10. Proposed Findings of Fact and Conclusions of Law Lodged by Petitioner.

11. Notice of Motion and Motion for Further Consideration, for Order that no Judgment has been Entered, to Vacate Judgment, to Settle Findings, and to Enter Judgment.

12. Affidavit in Support of Motion for Further Consideration.

13. Memorandum of Points and Authorities on Notice of Motion.

14. Findings of Fact and Conclusions of Law and Order Denying Claim of Alex E. Wilson.

15. Notice of Appeal.

16. Statement of Points upon Which Appellant Intends to Rely upon Appeal.

17. This Designation of Record on Appeal.

18. All Exhibits Introduced at the Hearings of this Petition.

Dated: May 14, 1957.

FILES & McMURCHIE,

/s/ By DONALD W. McMURCHIE,

[Endorsed]: Filed May 14, 1957.

[Title of District Court and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

Fred G. Stevenot, Trustee of the estate of the above-named Debtor, and Appellee herein, by and through his attorneys, Orrick, Dahlquist, Herrington & Sutcliffe, hereby designates the following additional portions of the record, proceedings and evidence to be included in the record on appeal herein:

1. Petition of Trustee for Authority to Sell Contracts of the Debtor, filed October 16, 1952.

2. Order Authorizing Trustee to Sell and Assign Certain Contracts of the Debtor, filed November 12, 1952.

3. Memorandum on Motion for Reconsideration, filed March 14, 1957.

4. Judgment and Order, filed March 19, 1957.

5. This designation.

Dated: May 21, 1957.

ORRICK, DAHLQUIST,
HERRINGTON & SUTCLIFFE,
/s/ By WALTER G. OLSON,
Attorneys for Trustee.

[Endorsed]: Filed March 22, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

1. Petition of trustee for authority to sell contracts of the debtor.

2. Order authorizing trustee to sell and assign certain contracts of the debtor.

3. Petition of Alex E. Wilson for allowance of Real Estate Brokers Commission.

4. Order fixing hearing for consideration of petition for allowance of Real Estate Brokers Commission and notice.

5. Objections by Trustee to allowance of Real Estate Broker's Commission.

6. Affidavit of Trustee in opposition to petition for allowance of Real Estate Brokers Commission.

7. Memorandum & Order.

8. Findings of fact and conclusions of law and order denying claim of Alex E. Wilson (Proposed by Trustee and not signed).

9. Findings of fact and conclusions of law (Proposed by petitioner and not signed).

10. Notice of motion and motion for further consideration, for order that no judgment has been entered, to vacate judgment, to settle findings, and to enter judgment.

11. Affidavit in support of motion for further consideration, for order that no judgment has been entered, to vacate judgment, to settle findings, and to enter judgment.

12. Memorandum of points & authorities on notice of motion.

13. Memorandum on motion for reconsideration.

14. Findings of fact & conclusions of law and order denying claim of Alex E. Wilson.

15. Judgment and order.

16. Notice of appeal.

17. Cost bond on appeal.

18. Statement of points upon which appellant intends to rely on appeal.

19. Petitioner's designation of record on appeal.

20. Appellee's designation of additional portions of record on appeal.

21. Order extending time to docket appeal.

22. Petitioner's exhibits 1 to 17 inclusive.

23. Appellee's exhibits A to D inclusive.

24. Three (3) volumes Reporter's Transcript.

In Witness Whereof, I have hereunto set my

hand and the seal of said Court this 31st day of May, 1957.

[Seal] C. W. CALBREATH,

Clerk,

/s/ By C. C. EVENSEN,

Deputy Clerk.

In the District of the United States, Northern
District of California, Northern Division

Bankruptcy No. 12223

In re: COASTAL PLYWOOD AND TIMBER
COMPANY, Debtor.

REPORTER'S TRANSCRIPT OF PROCEED-
INGS ON PETITION FOR AGENT'S COM-
MISSION

Monday, June 21, 1954

Before Hon. Oliver J. Carter, Judge.

Appearances: For the Trustee: Sterling Carr, Esq., and W. G. Olson, Esq. For the Debtor: Herbert Dudley, Esq., Cloverdale, California. For the Petitioner Alex E. Wilson: Files and McMurchie and Clifton Hildebrand, Ochsner Building, Sacramento, California. [1]*

The Clerk: Bankruptcy No. 12,223 in re Coastal Plywood and Timber Company, motion for agent's commission.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Court: All right, gentlemen, are you ready to proceed?

Mr. McMurchie: Yes. I thought it might be best if I proceeded with some type of statement as to the background.

The Court: Yes, you may make one.

Mr. McMurchie: If the Court please, this is a petition for the allowance of a real estate broker's commission to Mr. Alec E. Wilson, who we contend is the real estate broker who brought together Coastal Plywood and Timber Company, the debtor organization in this re-organization proceedings, and the Sugarman Lumber Company, who is the purchaser of the assets of Coastal Plywood and Timber.

The confirmation of this sale to Sugarman Lumber Company was made by this Court in March of this year for the sum of \$4,452,275.00.

This corporation has been in re-organization since 1951 and there is a multitude of proceedings that have taken place in this re-organization. It was not until July of 1953 that Mr. Wilson procured for this corporation its first offer for the purchase of its assets. Up until that time the only re-organization proceeding which was pending was a proceeding for a continuation of the business of the corporation under the direction of the trustees. That first plan of re-organization, however, was not satisfactory to the secured creditors, Bank of America and the RFC, and for that reason was never put into effect.

So the corporation was in an open re-organization status until this offer was received from Sugarman Lumber Company, which has finally been accepted.

I think the evidence will show that as a result of that offer all of the creditors and all of the stockholders are being paid a hundred percent on the dollar, which is certainly unusual in re-organization proceedings.

This petition has been filed by Mr. Wilson under Section 242 of the Bankruptcy Act, which authorizes the Court to allow reasonable compensation for services rendered by any party in interest of the administration of an estate in bankruptcy.

I also want to call to the Court's attention the case of Berman vs. Palmetto Apartments Corporation——

The Court: Is that cited in the memorandum?

Mr. McMurchie: That is cited in the memorandum at the conclusion of my petition, your Honor. It is 153 Federal 2nd 192. I have it here.

It is the only case that I have been able to find which deals with the allowance of a real estate broker commission in the re-organization proceedings, and I feel that the case is unusual in that it is almost directly in point in the case that is now before the Court.

In that case the Lower Court refused the allowance of a [3] commission and the Upper Court reversed, saying that it was clearly a case in equity—perhaps it would be easier if I read a portion of this case to the Court.

The District Court denied the petition all together. This was a petition of a real estate broker filed by the real estate broker as in this case. The Court filed an opinion which contained a finding that there was no valid existing contract between appellant and trustee for the payment of the commission to appellant.

I believe the same contention will be made in this case.

“Conceivably, this may be true, because the contract never had the sanction or approval of the Court; but we are not limited to a consideration of the strict legal rights of the parties. Appellant’s case, the broker’s case, cuts deeper than this.

The District Court was sitting in bankruptcy and under the Bankruptcy Act has equitable jurisdiction. It is generally held that a selling agent is entitled to compensation if the agency is the procuring power of the sale, and when his communication with the purchaser has been the means of bringing the purchaser and his principal together, his right to compensation is complete.”

The Court goes on to say: “The original offer, the withdrawal of it and the subsequent offer confirmed by the Court, were phases of a continuing transaction which resulted in the [4] sale and which appellant had equitable if not legal rights, since at the behest of the trustee and after diligent effort he found the purchaser.”

In the case I believe you will find there no prior authorization by the Court for the man to be employed as a real estate broker, talking from the

Berman case which I have just read from, nor was there any written authorization from the trustee to the broker. Yet in spite of that fact the Circuit Court here has directed an order for the payment of broker's commission when the broker secured the purchaser at the request and behest of the trustee.

The Court: Is that your position in this case, that the broker secured the purchaser at the request of the trustee?

Mr. McMurchie: Correct, your Honor, and that his services——

The Court: Insofar as you can answer the question, is there going to be an issue of fact on that question itself?

Mr. McMurchie: I believe there will not. There is some possibility——

Mr. Olson: Yes, your Honor, there will definitely be an issue of fact on that point.

The Court: That fact I will have to determine.

Mr. McMurchie: Yes, of course, your Honor.

I also feel that in this case the services of Mr. Wilson have been of substantial benefit to the estate and to the stockholders and to the creditors, and I believe that brings [5] it clearly under Section 242 of the Bankruptcy Act. That is what that section, in my mind, is for, is to make the payment of reasonable compensation for services rendered which have benefitted the re-organization of a bankrupt estate.

The Court: All right. You have no other authorities to cite, Mr. McMurchie?

Mr. McMurchie: I have none at this time.

The Court: All right.

Mr. Olson: May I reply briefly to that, your Honor?

The Court: What?

Mr. Olson: Would it be in order for me to reply to that briefly at this point?

The Court: Certainly you have the right to and I want to hear from you. Now you represent the trustee?

Mr. Olson: We represent the trustee, Mr. Stevenot, your Honor.

The Court: Are there any other parties who want to make an appearance here?

Mr. Dudley: I represent the debtor, your Honor.

The Court: And you want to appear in opposition to the petition?

Mr. Dudley: Yes, your Honor.

Mr. McMurchie: Your Honor, I think it might be best to go briefly into the facts of this case if there is going to be any argument on it. I think an estoppel question is going [6] to come up here because Mr. Wilson was engaged actively in the procuring of two purchasers in this re-organization proceeding. He was first authorized by the trustee to find a purchaser for certain *contacts* owned by the debtor corporation. The evidence will show that he expended a considerable amount of time in finding that purchaser.

The Court: What materiality has that to this issue?

Mr. McMurchie: I believe it is going to establish an estoppel because in that situation he was paid by the trustee and authorized by the Court to be paid a

broker's commission, and the background is identical to the background in the sale of the assets.

The Court: The only reason I want to hear from Mr. Olson is to find out if we can limit the issues in the matter if possible, and I wanted at the outset an opening statement and not in the way of any particular arguments. I want to hear his position.

Mr. Olson: If your Honor please, the position of the trustee with regards to the facts is set forth in an affidavit of the trustee which we have filed in opposition to the claim by Mr. Wilson. In brief, let me say this: The trustee's position in regards to the facts is simply this, that the trustee has at no time authorized Mr. Wilson or requested Mr. Wilson to act for him or for the debtor. In fact, the trustee had an understanding with Mr. Wilson that if Mr. [7] Wilson engaged in any activities in this proceedings he would act only on behalf of the people he brought in, and under no circumstances would a commission be paid by the trustee out of the debtor's estate, and it was on that understanding that the trustee relied.

Now counsel referred briefly to that prior transaction in which Mr. Wilson received a commission on the sale of some cutting contracts, relatively small assets in the debtor's estate.

Now the position of the trustee and the facts in that matter are as follows: The trustee had these cutting contracts which he could not take advantage of and he determined to sell them if he could get a good price for them.

Again Mr. Wilson came to the trustee's office and

the trustee told him that under no circumstances would he employ a broker or pay a commission.

Unfortunately, when the offer came in from Mr. Nielson at Santa Cruz it had a provision in there that out of the \$100,000.00 selling price for these contracts, \$5,000.00 must be paid to Mr. Wilson and no effort of the trustee could obtain an elimination of that provision and condition of the offer and the trustee, feeling that \$95,000.00 was a fair price for the contract was in effect forced for business reasons to go ahead on that procedure and approve that Mr. Wilson receive \$5,000.00 out of the proceeds of the sale of this contract, namely, \$100,000.00, but only because the [8] purchaser made it a condition of his offer.

It is the trustee's position that Mr. Wilson has never represented the trustee or been asked to represent the trustee or act on behalf of the trustee.

The Court: What explanation does the trustee have that he did not sell at \$95,000.00 and tell the purchaser to pay Mr. Wilson \$5,000.00 out of his pocket?

Mr. Olson: I am not sure I get that question.

The Court: In other words, if the estate was only going to receive \$95,000.00, why didn't he make the sale for \$95,000.00 and let the purchaser pay Mr. Wilson the \$5,000.00?

Mr. Olson: Because, your Honor, Mr. Nielson refused to change his offer. His offer came in for \$100,000.00 subject to a commission to be paid to Mr. Wilson in the amount of \$5,000.00.

The Court: He wouldn't change it.

Mr. Olson: He wouldn't change it.

The Court: I just wanted to be sure that I understood you. There was a discussion of this proposition of having a sale of \$95,000.00 and letting the purchaser pay the \$5,000.00?

Mr. Olson: That is correct. The purchaser—we endeavored to get that changed, the purchaser was anxious to proceed immediately however, and present the matter to this Court.

The Court: All right. Well, I suppose we will just have to argue those inferences to be drawn from those facts. [9]

Mr. Olson: Briefly in regards to the authorities, your Honor, simply to state the trustee's position—

The Court: Have you those cited in a brief, Mr. Olson?

Mr. Olson: No, your Honor, we have not filed any authorities as yet.

The Court: All right.

Mr. Olson: The claimant, Mr. Wilson, is proceeding under Section 242 of the Bankruptcy Act, and as I understand it, he is relying on the language of the section which permits allowance of a reorganization fee to any other parties in interest.

Now, your Honor, we have several authorities which I can cite to you which state that parties in interest include only officers of the Court—namely, the trustee, referee, and so on,—and the debtor itself, indenture trustees, and in addition to that only creditors and stockholders.

If your Honor please, Mr. Wilson does not fall under any of those categories.

The authorities, your Honor, are as follows:

In re South Street Building Corporation, 104 Federal 2nd, 353; in re Panhandle Reducing and Refining Co., 25 Fed. 2nd, 907, at page 911; in re Paramount Publix Corporation, 12 Fed. Supp, 823, page 827.

One of those cases in particular, your Honor, is squarely applicable here, and that is the Panhandle case, and it [10] involved a claim for commission by a person who negotiated an underwriting of securities under the plan and the Court referred to Section 242 and said, as I have already stated, that the term "parties in interest" included only certain people, and a volunteer or a person who was not actually a party before the Court or creditor or stockholder was not entitled to any compensation under that Section.

Now, your Honor, in reference to the Berman case there are a number of decisions which have a very direct bearing on this particular question and a much more direct bearing than the Berman case. One in particular, your Honor, is in re Equitable Office Building Corporation, appearing at 83 Fed. Supplement 581, a 1949 decision of the District Court of New York, and there is some language which I particularly want to refer to your Honor.

The Court stated as follows:

"It is to be borne in mind that Mr. Duncan, that is the trustee, without express sanction of the Court was without authority to obligate this estate for the payment of a broker's fee. This is a circumstance concerning which the petitioners were either aware

or should have known. If they expected to be paid the brokerage commission under the claim they should have at the offset clarified their status and asked that it be approved by the Court, and the failure to take these steps can not now be ignored.”

Another case directly in point is in *re Grime*, 35 Fed. [11] Supplement 15. General order 52, I believe it is, your Honor—no, general order 45 of the general rules in bankruptcy expressly states that no auctioneer shall be employed by a receiver, trustee, or debtor except on order of the Court expressly fixing the amount of the compensation. General order 45 is made applicable in re-organization proceedings by general order 52.

The case of *in re Grime* involved a broker employed for a private sale, actually employed by the trustee, and the Court said that the policy underlying general order 45 is directly applicable and prevents any allowance of compensation to a broker unless an order is procured in advance authorizing the trustee to employ that broker and fixing his amount of compensation.

There is a long line of cases, your Honor, holding that a volunteer is not entitled to a re-organization fee, that line of authority being to the same effect, unless an order of the Court is obtained or unless the person claiming compensation is a party in interest as defined by the authorities, no compensation may be allowed.

There are several other legal points on which we rely, your Honor: One, a line of authorities to the effect that in no event can a commission be recov-

ered where there is an express understanding between the broker and the trustee that no commission would be charged.

And I might refer your Honor to the case of *Henry v. Craige* [12] & Co., at 273 Federal, 926.

In addition, we contend, your Honor, that Mr. Wilson represented conflicting interests. He represented the purchaser or someone who purported to represent the purchaser in this matter, at least so his petition alleges, and he contends, your Honor, that he had an agreement with this gentleman named Steinberg, who is alleged to have represented the purchaser for payment of compensation to him by Mr. Steinberg.

Under the general principles rule of law, your Honor, one who represents a conflicting interest cannot recover.

In a bankruptcy situation, however, the rule is much stronger, for reasons of very obvious policy and I will refer your Honor to the case of *Woods v. City National Bank and Trust Co.*, appearing at 312 US 262, 61 Supreme Court 493, where the Court points out that the term "reasonable compensation for services rendered" as used in the Bankruptcy Act necessarily implies loyal and disinterested service in the interest of those for whom the claimant purported to act.

I have several other cases on that very point, your Honor, if you would like me to cite them, or shall I defer that until a later point in the hearing?

The Court: Yes, I would, and in the event you want to prepare a memorandum you may.

Mr. Olson: In closing, your Honor, let me say that the [13] trustee has no knowledge that Mr. Wilson was any procuring party in this sale, we deny that on information in *believe* and we believe that your Honor will find that Mr. Wilson was not the procuring party in this sale.

Mr. Hildebrand: If your Honor please, I am afraid that we did not get our whole position before the Court so that the Court will understand the issue. Here is the situation as our evidence will present it:

Mr. Wilson, a real estate broker, is very friendly with Mr. Stevenot and very friendly with Mr. Carr, the attorney for the trustee. He has been many years in the real estate business of selling large amounts of timber, many millions of feet of timber.

He goes in and sees Mr. Stevenot and Mr. Stevenot says, "Well, it would be very advantageous to this estate if we could sell all the timber." Mr. Wilson wants to sell it piece by piece. "No," Mr. Stevenot says, "we cannot do that but if we can sell the whole thing, then a deal could be made."

Wilson says, "I will go to work on that."

Mr. Stevenot does not tell him not to. He knows he is working on it, and Mr. Wilson, knowing everybody in the industry and having wide contacts in the fields, goes to work on it and he contacts a vast number of people, and then, as the evidence will show here, he finally gets one large purchaser, Mr. Holm. Mr. Holm, in turn, gets the others [14] together and they make a deal.

Then in the mean time, the Sugarmans down in

Los Angeles decide that they will not go ahead with this deal unless they have the lumber resold before they get into the deal. In other words, they are going to make about \$2,000,000.00, or at least a million and a half sure thing without putting up a nickel, and here is a man that did all the work.

He put the deal together to start with, to get the purchaser when the trustee was just sitting there doing routine work. It would be a nice thing if we could get a purchaser who would buy all this timber, and then they get a purchaser through the efforts of this man we represent and then the very day that the deal is put together the trustee writes a letter to Mr. Wilson and says, "You understand that we can't pay you any commission," when he knows that the people in Los Angeles, the Sugarman, have accepted the deal, when he has even arranged for the resale of the lumber, so that all the Sugarman have to do is to come into the deal, they have already got it resold and they make a cool million and a half without putting up a nickel, and this man did all the work.

Now that is our case, and if there is any equity in any Court, the man who put the whole deal together, who got the purchaser for him, who even resold the lumber for them, is left out on the limb and these people get forty thousand and fifty thousand, and tremendous fees, and here is the man [15] who did all the work.

That is our case, and we feel it is an equitable case and under the circumstances, they cannot come along at the last minute after having already done

all the work, after having already put the deal together—we know usually in these deals the commission is never paid by the purchaser, the commission is always paid by the seller to the real estate broker, and in this very case on a hundred thousand dollar deal these same people, even though they hadn't authorized it, they come into this Court and ask that he be paid \$5,000.00 when he sold \$100,000.00 worth of timber for them in a preliminary part of this same deal, and now the very day when they consummate the deal and these fellows in Los Angeles, the Sugarman boys, are going to make a million and a half and put up nothing and take advantage of his work and labor, that very day, the trustee repudiates that he is going to pay him a commission and writes him a letter, after letting him go ahead and do all the work and advising him repeatedly as to what is happening.

Now that is our case, your Honor, and I wanted to get it clearly before the Court to start with so that the Court will know just what we are driving at.

Now as to this claim of conflicting interest, our position is this: a Mr. Steinberg had arranged a deal with the Sugarman boys. He got in touch with Mr. Wilson. Mr. Wilson told him what he was doing. He knew these lumber people, they all [16] wanted this lumber, and he had a deal. He could sell this lumber, and nothing to it.

So Mr. Steinberg was down in Los Angeles. He gets a hold of the Sugarman boys and the Sugarman boys say, "We will take it, but it has to be resold."

So Wilson says, "All right, I will resell it."

So he gets it resold for Sugarman's.

So Steinberg then tells Wilson — Wilson says, "Well, I don't know how I am going to come out on this, I am not a lawyer, I haven't any contract with the trustee, I did the work, I negotiated this sale, but I don't know where" —

Steinberg says, "I'll tell you, if I get paid anything by the Sugarman's, I will see that you get paid. How much have you got in it?"

Wilson said, "Well, I spent about \$25,000.00 in time and effort running here and irrespective of any fee, I am out about \$25,000.00."

And Steinberg says, "If they don't pay you and I get anything out of the Sugarman's, I will pay you \$25,000.00, and write you a letter to that effect."

But it is just one of those volunteer things on Steinberg's part, and now the Sugarman's have repudiated Steinberg and they have got a cool million and a half that was handed to them on a silver platter without putting up a dime, and they are not even going to pay Steinberg now, so if Wilson is going to get anything, unless he waits for the result of some [17] possible dispute or litigation between Steinberg and the Sugarman's, he has to get it in this proceedings.

Now that is our case and our contention in an equity proceeding, your Honor.

The Court: Let me ask one question of both counsel: what is there to argue about in this case in the dollars and cents.

Mr. Hildebrand: Well, we feel that five percent

commission is the usual commission, five percent of four million and some——

The Court: Where is it coming from?

Mr. Hildebrand: From the assets of the estate. They still have got a million and half, I think, or some such amount coming. Mr. Wilson doesn't want to embarrass the estate at this time if they don't have the money then pay him as they get the money on the deal arranged for. He certainly is willing—everybody else has been paid in cash, and he is the fellow that really set the thing up; but still, I mean, it can be worked out. There is plenty of money coming in.

The Court: The reason I asked the question is that I note there has been other proceedings which have been had before Judge Lemmon asking for the award of attorneys fees and other fees in this case, and I presume those awards were made in view of the amount of money that is left in the estate [18] and whatever claims have to be paid.

Mr. Hildebrand: If there isn't enough money left then, if your Honor feels that our evidence justifies the allowance. Mr. Wilson is perfectly willing to cooperate. He has cooperated right along with them, but there is over a million dollars coming in the near future for some of this timber that he negotiated the sale of, so there is plenty of money coming in to pay——

The Court: The only reason I asked the question is to know whether there is any property or interest in property on which the Court had any power to make any——

Mr. Hildebrand: I understand there is about \$150,000.00 in the estate, but how it may be obligated or what they have to do on that, of course,—

The Court: I don't know whether it makes any difference or not, but I asked the question simply so I will have some idea as to what the financial situation is.

Mr. Hildebrand: The main thing is there is still over a million dollars, we know that, coming in on the deal, even after the bank has been paid and after the RFC has been paid and after the attorneys and the trustee and everybody else has been paid. There is still a lot of money—

The Court: The only reason I asked the question is—at least he is not a preferred claim, he is no more than a general claimant, is that right? [19]

Mr. McMurchie: I believe, your Honor, under Section 242 he would be classified as an administrative expense of the estate, the same as the attorneys fees and the trustees fees.

The Court: At least that is what you contend.

Mr. McMurchie: That is our contention, and as such would have first priority against the assets of the company.

Mr. Hildebrand: They *sole* hold in this Berman case, which is the only case—we Shepardized it and it is the only case—

The Court: I am not going to argue the case any further. I wanted to get your positions in mind so when I hear the evidence I will be able to understand its bearing.

Mr. McMurchie: You may be interested in this Berman case, your Honor. I have the book here.

The Court: I will read it when the matter is submitted. I don't need it now.

Mr. Olson: Your Honor——

The Court: Yes, Mr. Olson.

Mr. Olson: Just one brief word, your Honor, in respect to the matter as to who did all the work in formulating the Sugarman plan and put money into it. That is a matter which I assume will not be retried at this point. I would like to refer your Honor to the opinion of Judge Murphy issued in April of this year after a three day hearing on a proceeding to set aside the plan of re-organization. It has some very [20] pertinent comments on that particular point, and indicates, I believe, that counsel was incorrect in his statement that all the work was done by Mr. Wilson and no money was put up by Mr. Sugarman.

The Court: Well, that is just the point; I don't want to get into taking testimony on anything that I do not have to and I want to get the issues limited to the proposition that is before the Court. Of course, if there has been any prior ruling by a judge in this case which is either the law of the case or might by any stretch of the imagination be determined to be *res adjudicata*, which I doubt occurred in the situation——

Mr. Olson: No, I do not mean to convey that.

The Court: Then, of course, I would be bound by those decisions, but it is up to counsel to point those out to me. I don't know what the problem is.

Now I assume, gentlemen, that you desire to offer testimony on the issues that are involved here. How many witnesses do you have, Mr. McMurchie?

Mr. McMurchie: I have two witnesses, your Honor, Mr. Steinberg and Mr. Wilson.

The Court: And how many do you expect to call?

Mr. Olson: We expect at this point to call only the trustee, your Honor.

The Court: All right. Now then, counsel for the debtor, [21] Mr. Dudley, do you have any statement to make at this point so I can have your position?

Mr. Dudley: No, your Honor, unfortunately, the debtor has none of the facts available, all these transactions are supposed to have taken place with the trustee, and we can only concur in what action the trustee takes.

The Court: All right, Mr. McMurchie, call your first witness.

ALEX E. WILSON

called for the petitioner, sworn.

Direct Examination

Q. (By Mr. McMurchie): Mr. Wilson, will you give the Court your address?

A. My home or my office?

Q. Both addresses.

A. I live at 1360 Jones Street, San Francisco; my office is in the Alexander Building, Suite 501, 155 Montgomery Street, San Francisco.

Q. Are you a duly licensed real estate broker in the State of California? A. I am.

(Testimony of Alex E. Wilson.)

Q. And for how long a period of time have you been a licensed real estate broker?

A. I have been a real estate broker for thirty-three years. [22]

Q. During this period of time have you specialized in any particular type of transaction?

A. I got back from Europe from the War in 1945, and at that date I started to specialize in the sale of timber lands.

Q. For how long a period of time have you so specialized since the War?

A. Since 1945, when I returned.

Q. Do you have an estimate of the amount of timber land which you sold during that period of time?

A. Yes sir. I have sold approximately five hundred million feet of timber since 1945.

Q. During all of that time, Mr. Wilson, were you ever paid a commission by anyone other than the seller?

A. No sir, I have never been paid a commission by any one but the seller in thirty-three years.

Q. I assume that through your work in timber land you had become acquainted with firms and businesses which handle lumber and timber on the west coast?

A. Yes I have.

Q. When did you first become acquainted with the properties owned by Coastal Plywood and Timber Company?

A. I just returned from Europe and Mr. Henry Crowfoot, Sr., who bought these properties for

(Testimony of Alex E. Wilson.)

Coastal, called on me in San Francisco. I had known Mr. Crowfoot when he used to be a cruiser in Alaska for Lord Northclift. He asked me to [23] go over the properties in the Garcia Tract and the Ricard in 1945, stating at that time or shortly after they may be for sale, and he thought if they were he would put me in contact and I could sell them.

We walked over almost all of that property—at one time in fact, we were lost there for three days and three nights; it was on Election Day as I recall, and the fog came in and we walked from Boonville back and forth and came out at Gualala; so I walked over most of the property in the three days.

Q. Have you been connected with any particularly large timber transactions during your experience as a broker? A. Yes I have.

Q. Can you name any of them?

A. Well I put three million dollars worth of lumber into the atomic bomb plant at Hanford when Jones and Atkinson were building the atomic plant at Hanford. At that time I was a Lumber buyer working for the Anchor Bay Lumber Company, but during the last few years, from 1945 up until now, I have sold some very large blocks of timber to some of the large saw mills that are in business, and also to them.

Q. Now Mr. Wilson I assume that you know Mr. Fred G. Stevenot, who is the trustee?

A. Yes I am acquainted with Mr. Stevenot.

Q. Can you tell me how you first became acquainted with Mr. Stevenot? [24]

(Testimony of Alex E. Wilson.)

A. Mr. Sterling Carr has been my lawyer for about twenty-five years and has been my very close friend. He knew I was selling timber and I went up to his office one day and he told me that the Coastal were in bad shape and that they wanted to sell the assets. He told me Mr. Stevenot was the trustee and if I would like I should go down and see him. I did so.

Q. Approximately when was that?

A. That was in July 1952.

Q. July of '52? A. Yes sir.

Q. And where did you first meet Mr. Stevenot?

A. I went down to Mr. Stevenot's office, which is in the main branch of the Bank of America building at California and Montgomery Streets in San Francisco.

Q. And did you talk to Mr. Stevenot at that time?

A. Yes; I went into Mr. Stevenot's office and introduced myself, I told him that Mr. Carr had told me that he would like to sell the properties.

Q. Was any one else present at that time?

A. There was no one else present except Mr. Stevenot and I.

Q. Can you relate that conversation for us?

A. Yes, I can. Mr. Stevenot said that right at the moment they wanted to buy some large equipment up at the mill at Cloverdale and needed some money. He said they had some contracts, known as the Ricard, the Brush and the Reynold contracts, timber contracts. That they would like to sell [25]

(Testimony of Alex E. Wilson.)

them immediately as they needed the money and there were some points about those contracts which were very bad.

Number one, all the timber had to be removed by 1956. There was seventy-six million feet of timber there. Another point the contracts stated that all the land must be cleared. It didn't specify how it should be cleared under this lumber contract.

Also there were right-of-way troubles. They were contracts that were very dangerous for the Coastal Plywood Company. They turned out to be very dangerous for anyone.

Anyway he said he wanted to sell them immediately. I said I thought I could do it.

Q. Did he discuss with you the price that he wished to obtain?

A. Yes, Mr. Stevenot told me he wanted to get a hundred thousand dollars cash for the Coastal and that they wanted to assign the contracts without any liability whatsoever thereafter. They wanted to assign them to the buyer so the buyer could not come back onto Coastal in any way.

Q. Was any mention made of possible prospects you might have?

A. Oh, I mentioned many prospects I might have.

Q. What did Mr. Stevenot say in that regard?

A. Mr. Stevenot told me as he has always told me, he said, "All right, Wilson, I want you to sell them, and I want to get a hundred thousand dollars,

(Testimony of Alex E. Wilson.)

but I want you to get [26] commission from the buyer, I want the buyer to pay you.”

Q. What did you reply to that?

A. Oh I told Mr. Stevenot then, as I have told him many times, I said, “Well, that is a very difficult thing to do; the buyer never pays, the seller always pays. I will try to do it, but I don’t think I can.”

Q. Did you ever agree with Mr. Stevenot in regard to these contracts that we are now discussing that you would obtain your commission from the buyer?

A. No, never; it was always a question of him saying to try to get it from the buyer and my saying, “Mr. Stevenot, I can’t get it from the buyer.”

Q. Now following this meeting with Mr. Stevenot did you proceed with your attempts to find a purchaser for these contracts?

A. I did, sir.

Q. And over what period of time were you working on obtaining a purchaser for these Brush, Reynold and Ricard contracts?

A. I started in July immediately after I met Mr. Stevenot in 1952 and I sold them, I believe, in October, 1952.

Q. Now during that period of time between July and October of 1952 you worked on these contracts?

A. Yes sir.

Q. Can you tell me some of the people who you contacted and some of the things that you did? [27]

(Testimony of Alex E. Wilson.)

A. Yes I could. I have here a list, and may I read them to you?

Q. Yes, refer to your list. Do you want to see the list? (Exhibiting document to counsel.)

The Witness: I just want to see if I have the right ones. Yes, these are lists——

Q. Can you give us then Mr. Wilson some of the people whom you contacted and the work that you did with those people?

A. Yes I can, sir. As I stated, I started in July, 1952 and sold the properties October 11, 1952. Some of the people that I contacted were the Harold L. Putnam Lumber Company of Harbor, Oregon.

Q. How did you contact them?

A. I contacted these men by telephone and by letter and by advertisements. I might state that I started my campaign with advertisements—some of the copies I have—in the Portland Oregonian and the San Francisco Examiner.

Q. Did you have some other people that you contacted during that time?

A. Yes sir. Then I contacted Van Buckster of the Price Building Company in Palo Alto; Carleton L. Rank of Lafayette.

The Court: That is the attorney?

A. Yes sir.

The Court: That used to be in Oakland?

A. Yes, and he is now a timber broker, I believe. [28]

The Court: And also carried on some management of some business in Eureka?

(Testimony of Alex E. Wilson.)

A. I believe so.

The Court: Or Arcata?

A. I believe so. Then Ed Lassard of the Craig Lumber Company of Philo. I took Mr. Lassard twice completely over the Coastal properties together with the Ricard, the Reynold and the Brush properties.

Then J. Warren Brigte of Coos Bay, Oregon. J. J. Steig or Steiger of Klamath Falls, Oregon.

I took Warren C. Powell of Roseburg, Oregon, to the property; Ralph Costdick of the Costdick Lumber Company of Salkum, Washington; the Pickering Brothers Logging Company of the Dalles, Oregon; W. M. Howe of Lyons, Oregon; Alexander Lumber Company of Gold Beach, Oregon.

I took these men completely over the property.

Then B. M. Burns, owner of the Anderson Valley Lumber Company at Philo. The Empire Lumber Company of Richmond, California; Herbert L. Snyder of the Northland Lumber Company of Garvias, Oregon.

Q. (By Mr. McMurchie): These are all people that you contacted?

A. These are all people that I wrote to or took to the property or telephoned many times and sent them—all of these people were sent maps by me of the Coastal properties, reports, inventories, surveys, cruises—by that I mean timber cruises. [29]

Joe Mancy of Wenlock, Washington; Carl Walker, General Manager of Feather River Pine Mills of Feather Falls, California; — Mr. Carl

(Testimony of Alex E. Wilson.)

Walker and I spent three days, staying in Boonville and went completely over these properties; S. J. Hall of Santa Rosa; the Speckard Lumber Company of Marysville, California—Mr. Speckard and I spent three days on the Coastal and the Ricard properties going through the forest; Otto Werman of the Aberdeen Lumber Company of Aberdeen, Washington; Peter Eathol of Seadrow Valley, Washington; Bob Jensen of Willits, California; Fred Dixon of Colton, Oregon—Fred Dixon and I spent three days—an entire day on the Coastal property and two days on the Brush and Reynold contracts and the Ricard; H. Kling of Colton, Oregon; Harry W. Johnson of Canyonville, Oregon; W. M. Howell of Mill City, Oregon.

I have notes here that I wrote about a hundred letters in this deal, ran ads in the San Francisco Examiner, the Portland Oregonian, copies of which I have attached here, all paid by me, of course.

Q. Now Mr. Wilson we have been discussing here so far mainly these contracts, the Brush, Reynold and Ricard contracts. A. Yes sir.

Q. But you mentioned in your testimony that you also discussed with these people the sale of the Garcia tract? A. Yes. [30]

Q. When did you first become acquainted with the Garcia tract?

A. Well of course I was well acquainted with it when I walked over it for three days and three nights, but Mr. Stevenot told me when he instructed me to sell the Ricard, Brush and Reynold contracts,

(Testimony of Alex E. Wilson.)

he said, "Now I am having some business with the court and in a very few days I will want you to try to sell that also."

So knowing that I didn't wait, I put an ad—here is an ad in the Portland Oregonian in September, 1952: "For Sale six hundred million feet of virgin redwood and douglas fir in California." That is the Garcia tract. I put six hundred million feet because Mr. Stevenot didn't have the cruise finished at that time. He later finished the cruise and the cruise showed five hundred and eighty-five million feet, I believe—it was a little short of six hundred million.

Then the ad continued: "Will sell sixty million feet separately." Then I had the box, "Write C. 3324." That is my box number.

What I was doing there I was advertising both pieces.

Q. That is the point I was trying to bring out. As I understand it when you approached these people in regards to these contracts you also discussed with them the purchase of this Garcia tract?

A. Yes sir. Whenever I found a man that I thought had enough money to buy the Garcia—Mr. Stevenot always told me [31] to get four million dollars if I could—Mr. Stevenot says, "If you can bring in an offer for four million dollars I am sure we can make a deal and the court will approve it." So I began quoting the four million.

Q. What portion of this time between July, 1952, and October of 1952 was spent on the Garcia

(Testimony of Alex E. Wilson.)

tract as distinguished from the Brush, Reynold and Ricard contracts?

A. I would say about a quarter of my time.

Q. About a quarter of the time that you have related so far was spent on the Garcia tract?

A. That is true.

Q. Can you tell us what the Garcia tract consisted of?

A. The Garcia tract consisted of thirty-six thousand acres of land. It ran practically east and west. The eastern boundaries started a little bit west of Boonville and it ran over almost to the ocean. It was a very fine tract of timber consisting of redwood, douglas fir mostly, but there was about eight percent of sugar pine.

The Court: Is that named the Garcia tract because of the Garcia River water shed?

A. I presume sir that that was the reason.

Q. (By Mr. McMurchie): As I understand, it was the sale of this Garcia tract along with the other assets of Coastal which is the subject of this hearing at the present time?

A. That is true.

Q. Now during this period from August of 1952, to October [32] 1952, were you in contact with Mr. Stevenot in any way?

A. Oh yes, I was in contact with Mr. Stevenot every week, sometimes two or three times a day in his office, phoning him, sending him telegrams from where ever I was, I wrote him many letters telling him of my progress, the people I was calling on, the

(Testimony of Alex E. Wilson.)

extent that I was happy or my disappointments, if any.

Q. During this time did Mr. Stevenot give you any instructions or directions as to the sale of the contracts?

A. Oh yes, Mr. Stevenot was very, very helpful. He gave me maps, he gave me cruises and he gave me everything I asked for and aided me in every way in completing the sale. He was very cooperative.

Q. Did he ever discourage your efforts on behalf of the debtor corporation in any way?

A. No, he encouraged me, telling me he was sure I could sell it, he was sure I would sell it.

Q. Now you say you did find a purchaser for the Brush, Ricard and Reynold properties?

A. I did.

Q. What was the name of that purchaser?

A. I finally found one of my clients, Mr. Clarence Nielson, and his wife, Amy K. Nielson, of Santa Cruz.

Q. Now were your negotiations with Mr. Nielson prior to his purchase extensive or were they restricted?

A. They were very extensive because I went many times, [33] four or five times, with Mr. Nielson to look the property over again and Mr. Stevenot told me that he must have a hundred thousand dollars for it. I told Mr. Nielson that. I went down to Santa Cruz and Mr. Nielson told me, he said, "Well, Wilson, I will buy the property."

(Testimony of Alex E. Wilson.)

He gave me a financial report, he was worth about \$700,000.00. He said I haven't got one hundred thousand dollars in cash, but if you will arrange a loan for me with the Bank of America I will buy the property for a hundred thousand dollars.

I went down to Santa Cruz and we went to his Bank of America, the branch bank, and Mr. Nielson met with a little resistance there and he was quite disappointed. So was I. But I knew Mr. Meyers, the manager of the main branch, and Mr. Michelltti, his assistant. So I told Mr. Nielson that I thought he should come with me to San Francisco, that I fully believed that with his financial report the main branch would give him that money.

He came with me to San Francisco and we stayed here several days meeting with Mr. Michelltti and Mr. Meyers—I kept Mr. Stevenot informed of that, he knew all about that—and soon Mr. Meyers and Mr. Michelltti told me that they would give Mr. Nielson a hundred thousand dollars.

Q. Thereafter did Mr. Nielson submit an offer of purchase?

A. Mr. Nielson submitted an offer of one hundred thousand dollars cash which Mr. Stevenot had instructed me to obtain for him. [34]

Q. Mr. Wilson I hand you here a letter which is on your letterhead and purportedly signed by Clarence L. Nielson. Do you know Mr. Nielson's signature?

A. Yes sir.

Q. Did you see him sign that letter?

A. Yes. I wrote it for him.

(Testimony of Alex E. Wilson.)

Q. That is his signature? A. Yes sir.

Q. Was that letter delivered to Mr. Stevenot?

A. That letter was delivered to Mr. Stevenot.

Mr. McMurchie: I ask that this letter be introduced into evidence as Petitioner's Exhibit One, your Honor.

The Court: It will be admitted into evidence as Petitioner's Exhibit One.

(The document referred to was marked Petitioner's Exhibit Number One.)

Mr. McMurchie: The letter reads:

"I now wish to submit to you the following proposition for the purchase of the contracts held by Coastal Plywood with the following land owners; Stanley E. and Delia A. Brush, Pauline Brush; George E. Remmell; Rankin P. Rickard, Marjorie Rickard, Wesley P. Rickard, Vina M. Rickard and W. L. Rickard.

You are to grant me a 60 day exclusive option to purchase the said properties during which time I will attempt to secure from the above named land owners, certain changes in their [35] contracts with Coastal Plywood Company, satisfactory to me.

In the event that I secure said changes satisfactory to me I will turn over to you \$100,000 for the purchase of all of your interests in the said contracts. In this event I will accept the said contracts from you without warranty or guarantee of any kind commencing on the date I take them over.

In the event that I fail to obtain from the above named land owners contracts or amendments to

(Testimony of Alex E. Wilson.)

present contracts, satisfactory to me, then, and in that case my money or check, in its entirety, shall be returned to me, and there shall be no deal, or liability on the part of either party.

I am hereby attaching my check in the sum of \$5,000 as a good faith payment and as evidence of my sincerity in carrying out this deal if possible. In the event that the said deal is not consummated this \$5,000 check, hereby attached, is also to be returned to me."

Q. (By Mr. McMurchie): Do you know Mr. Wilson whether that offer was accepted by Coastal Plywood and Timber Company?

A. That offer was accepted by Coastal Plywood and Timber Company.

Q. And was that offer submitted to the Court for confirmation?

A. It was submitted to Judge Lemmon in this Court and confirmed. [36]

Q. Did that confirmation contain the provision for the payment of a real estate broker's commission?

A. Yes, it contained a provision to pay me \$5,000.00 or five per cent on the purchase price of \$100,000.00

Q. And that was an authorization to accept the purchase price of \$100,000.00 and to pay you a commission of \$5,000.00?

A. Yes, by Coastal Plywood.

Q. Now \$5,000.00 on the sales price of a \$100,-

(Testimony of Alex E. Wilson.)

000.00 would be five per cent commission, is that correct? A. That is true, sir.

Q. And is that the usual commission for a real estate broker?

A. That is the usual real estate commission in California.

Q. What do you base that on?

A. I base that on all the real estate associations in the State, the San Francisco Real Estate Association regulations, a copy of which I gave you the other day, the 1954 edition.

Q. The 1954 edition of the San Francisco Real Estate Board rating? A. Yes, sir.

Q. That calls for a five per cent commission to a real estate broker? A. That is true.

Q. And that amount was paid to you in this transaction? A. Yes, by the Coastal Plywood.

Q. Who paid you the \$5,000.00? [37]

A. Mr. Stevenot handed it to me in his office and it was paid to me by the Coastal Plywood Company.

Q. Did you retain the attachment to that check?

A. I did.

Q. Was that attached to the check at the time it was delivered to you?

A. Yes, sir, it is the stub which I tore off the main check and kept it as a reference for my file.

Q. And that reads, "Commission sale of cutting contracts, \$5,000.00," does it not?

A. That is true.

Q. And that check was made payable by Coastal Plywood and Timber Company?

(Testimony of Alex E. Wilson.)

A. That is true.

Mr. McMurchie: I introduce this as Petitioner's Exhibit Number Two.

The Court: All right it will be marked Petitioner's Exhibit Number Two.

(The document referred to was marked Petitioner's Exhibit Number Two.)

Q. (By Mr. McMurchie): Prior to this sale of the contracts to Mr. Nielson had you ever discussed with Mr. Stevenot the payment to you of a real estate broker's commission for the sale of these contracts?

A. Oh, many, many times. Mr. Stevenot would always tell me, "No, I don't want to pay you a commission, you must get [38] your commission from the buyer."

I told Mr. Stevenot, "Well, of course, that is a difficult thing to do, in my thirty-three years as a broker I have never been able to do it, but we will try."

But he always paid me in the final analysis. I thought that he would and he did.

Q. Prior to the sale to Mr. Nielson did Mr. Stevenot ever obtain authorization for you to act as real estate broker in the sale of this land?

A. No, sir. I didn't know I had to have authorization.

Q. You had no knowledge that authorization might be required? A. No, sir.

Q. Did Mr. Stevenot ever discuss Court authorization with you? A. No, sir.

(Testimony of Alex E. Wilson.)

Q. Did you know anything about Court authorization of your own knowledge? A. No, sir.

Q. In spite of that fact you did receive your commission of \$5,000.00 on the sale of the contracts?

A. Yes, he finally paid me. I think the day before the sale Mr. Stevenot said, "Well, we are going to pay you."

I said, "I am very happy to hear that." I said, "I thought that you would, I felt sure you would pay me, Mr. Stevenot." [39]

Q. We have been talking here, Mr. Wilson, about the period between July, 1952, and October, 1952, is that correct? A. That is true.

Q. And following the completion of this Nielson sale did you continue in your efforts to obtain a purchaser for the balance of the assets of Coastal Plywood and Timber Company?

A. Yes. Shortly after I sold the timber contract for Coastal Mr. Stevenot told me that he had ordered a cruise of the timber, the Coastal timber, and he had asked Hammond Jensen, the timber cruiser, to complete the same and it would be finished very soon.

I immediately started in to find a buyer for the Garcia tract and the remainder of the assets of the Company.

Q. Can you tell us some of the efforts which you took in your efforts to obtain a purchaser for the balance of the assets of Coastal?

A. Yes. I contacted probably all of the large

(Testimony of Alex E. Wilson.)

mills. I have a file here that shows partially something of what I did.

The Court: Mr. McMurchie, do you have any idea or estimate of how much longer it will take you to complete the direct examination of this witness?

Mr. McMurchie: I presume, your Honor, about a half an hour.

The Court: Well I have a problem as to time. I have a problem of picking a jury this afternoon in a condemnation [40] action which starts at one thirty. I don't know how long it will take to pick the jury. I imagine in the neighborhood of an hour to an hour and half, and I am going to have to continue this matter until the conclusion of that and then go forward with this matter. Then if we need more time it is going to be a situation of having to hear this either before or after court on the regular jury trial. However, I would hope that we might be able to conclude it today, if I can dispose of the picking of the jury rapidly enough.

Mr. McMurchie: I should think we could, your Honor.

The Court: Now I will anticipate there may be some arguments in this matter on the question of the jury, so I think it would be wise if I recessed this matter until two thirty and then we will go forward as rapidly as we can and attempt to conclude the matter this afternoon.

All right, we will be at recess until two thirty.

(Thereupon the further hearing of this matter was continued to two thirty p.m. this date.)

Afternoon Session—Monday, June 21, 1954

Mr. McMurchie: If the Court please, I have consulted Mr. Olson and by stipulation at this time I would like to call out of order Mr. William Steinberg.

The Court: You may do so.

Mr. Olson: Will Mr. Steinberg be available later in this hearing?

The Court: You feel you won't be able to complete your cross examination?

Mr. Olson: Well, I don't know. That is the question that is in my mind, how much time the Court will be able to allow us today and whether we will be able to conclude.

The Court: Well we will go as long as we can and not any later than five o'clock.

Mr. Hildebrand: Mr. Steinberg is a lawyer and I understand he has another case on tomorrow, and that is the reason we are putting him on out of order.

The Court: Well that is true, but what Mr. Olson wants to know is is he going to be cut short on the cross examination. He is entitled to a fair opportunity to cross examine.

Mr. McMurchie: I presume he will be available if necessary.

Mr. Steinberg: Oh, yes.

The Court: All right.

WILLIAM STEINBERG

called for the Petitioner, sworn.

Direct Examination [42]

Q. (By Mr. McMurchie): Now your name is William Steinberg, is it not? A. Yes, sir.

Q. And you are a practicing attorney before all the courts of the State of California, are you not?

A. Yes, sir.

Q. And you are practicing in San Francisco at the present time? A. Yes, sir.

Q. Mr. Steinberg, you are appearing here under subpoena, are you not? A. That is correct.

Q. Mr. Steinberg, I assume you know Mr. Alex Wilson? A. I do, yes, sir.

Q. When did you first become acquainted with him? Approximately what date?

A. In the early part of June, 1953.

Q. Can you tell me the circumstances under which you happened to become acquainted with Mr. Wilson

A. Mr. Kewin, whom I have known for a long time, brought Mr. Wilson into my office, stating that Mr. Wilson had a lumber deal which he controlled, if I knew anybody who would be interested in this particular lumber deal, and I told him in front of Mr. Kewin that if the lumber deal was attractive and if it had merit to it, that I had some people that would be very much interested in purchasing the lumber deal. [43]

Q. Mr. Wilson was referring to the assets of

(Testimony of William Steinberg.)

the Coastal Plywood and Timber Company, was he not?

A. After that he told me it was the Coastal Plywood and Timber Company, and at that time I told him I knew about it, but that I didn't know that anybody was in a position to deliver the Coastal Plywood Company and Mr. Wilson at that time said he was.

Q. That is the first time that you were informed then that any one was in a position to sell the Coastal Plywood?

A. That is correct.

Q. —that the assets of that corporation were in the market.

A. That is correct.

Q. Did you have any discussion with Mr. Wilson at that time as to the assets which were included within the properties of Coastal?

A. I did. I went into great detail with him, and he told me all of the assets, including the accounts receivable, timber and the mill, and he told me the price at which it could be purchased, and he said there would be no question about it if we came up with \$4,000,000.00 that the Court would approve it and we would be able to purchase them for \$4,000,000.00.

I told him to get all the information for me, the balance sheets and everything else that could be examined and if it merited \$4,000,000.00 I am sure that the people I was connected with and represented would pay four million dollars. [44]

Q. And whom did you represent at that time?

A. At that time I represented N. A. Sugarman

(Testimony of William Steinberg.)
of the Sugarman Lumber Company and other people interested with him. It was a group of people.

Q. N. A. Sugarman and his associates?

A. Yes, sir.

Q. What type of association was that, Mr. Steinberg?

A. At that time it was a very loose association, there was no association except if a good deal was presented to them they would sit down and give it considerable consideration and I would participate with them, I would do some of the work or all of the work and I would sit down and discuss that with them and they would furnish the funds for the purchase of that particular deal or any other deal that was available.

Q. We are speaking now of your association at the time of this first conversation with Mr. Wilson?

A. That is correct.

Q. Did Mr. Wilson procure for you this information that you required in order to have the Sugarman association become interested in the purchase?

A. He secured all the information that was necessary. I believe he had it all with him, the cruises, the balance sheets and all the necessary information giving the detailed information of the entire project.

Q. Did he tell you where he had obtained that information? [45]

A. He told me he had obtained it from the trustee, Mr. Stevenot.

(Testimony of William Steinberg.)

Q. You did not negotiate with Mr. Stevenot directly then in obtaining this information?

A. No, sir.

Q. Now did you take this information and assimilate it and present it to the Sugarman interests?

A. I did. I took all the information I had and I assimilated it and assembled it and set it all up and mailed it all down to N. A. Sugarman.

Q. And did he express any interest in this purchase?

A. They did at the time.

Q. Did you subsequently become associated with them in any more direct form than you were at the time of the entry into this transaction?

A. Well subsequently to that time we formed a joint venture on a verbal basis. Mr. Sugarman had fifty percent in the transaction, a man by the name of Margolis had twenty-five per cent and I was supposed to have twenty-five per cent interest of the transaction.

Q. Now am I correct in saying that as a result of this information and the presentation of this deal to you you were able to make an offer to the trustee of Coastal Plywood on behalf of the J. J. Sugarman Company?

A. I was authorized at the time to present an offer to the—a preliminary offer, rather, to the Coastal Plywood [46] Company to see whether they would be interested in a cash offer on the purchase of the Coastal Plywood Company.

Q. Did you make such an offer to the trustee of Coastal?

A. I wrote a letter, yes sir.

(Testimony of William Steinberg.)

Q. Is this a copy of that letter, Mr. Steinberg?
(Exhibiting document to the witness.)

A. Yes—wait a minute—excuse me, yes, this is a copy.

Q. That is a copy of the letter?

A. That is correct.

Q. The original letter was signed, is that correct?

A. The original letter was signed and there was four copies, I think made of the original letter and given to all the interested parties.

Q. Do you know whether those were delivered or mailed?

A. I personally delivered it to Mr. Stevenot and I gave a copy of it to Mr. Carr and I gave a copy of it to Mr. Olson and I gave a copy of it to Mr. Shannon who represented the Coastal Plywood at that time.

Q. And this offer, you say, was the result of the initial contact by Alex Wilson?

A. That is correct.

Mr. McMurchie: Offer this as Petitioner's Exhibit next in order, your Honor. I believe you have seen it, Mr. Olson, the offer of July 22? You have seen it, have you not?

Mr. Olson: Yes.

Mr. Carr: What is the date of that? [47]

Mr. McMurchie: Offer of July 22, 1953.

The Court: It will be admitted in evidence as Petitioner's Exhibit Number Three.

(Testimony of William Steinberg.)

(The document referred to was marked Petitioner's Exhibit Three.)

The Court: July what?

Mr. McMurchie: July 22, 1953. May I read it now, your Honor?

The Court: Yes you may.

Mr. McMurchie: July 22, 1953, on the letterhead of William Steinberg, Attorney at Law, 114 Sansome Street, San Francisco 4.

"Coastal Plywood and Timber Company and Fred G. Stevenot, Acting Trustee for Coastal Plywood and Timber Company, 300 Montgomery Street, San Francisco, California.

Re: No. 12223 United States District Court.

Gentlemen:

On behalf of J. J. Sugarman Co. of Los Angeles, California, I am authorized to make an offer of purchase for them of all of the assets of the Coastal Plywood and Timber Company, a corporation, upon the terms and conditions hereinafter set forth.

The Coastal Plywood and Timber Company, having filed its petition for an arrangement under the provisions of Chapter 11, shall assign, transfer and convey to J. J. Sugarman Co. all of its assets hereinafter described, so as to enable it to [48] effectuate a plan for arrangement under said Chapter 11 as follows:

1. That the total purchase price is \$3,750,000.00 for all of the net assets of Coastal Plywood and Timber Company, consisting of land, timber, lumber, logs, cash, accounts receivable, rolling stock,

(Testimony of William Steinberg.)

plant, machinery, equipment, mill site, etc., as per Balance Sheet of December 31st, 1952, prepared by Hood and Strong, Certified Public Accountants, totaling \$4,555,310.80, or the Balance Sheet of June 30th, 1953, whichever is greater, free and clear of all contracts, conditional sales contracts, claims, liens, encumbrances, taxes, penalties, and assessments of every form and nature.

a. The sum of \$750,000.00 is to be paid within ten (10) days after acceptance and confirmation of this arrangement by the Court.

3. The balance of \$3,000,000.00 to be paid within ninety (90) days after acceptance and confirmation of this arrangement by the Court, so that J. J. Sugarman Co. can be given the opportunity of organizing a new corporation to take over the said assets, the pay the sum of \$3,000,000.00, and to provide adequate working capital for the corporation.

4. That out of the \$3,750,000.00 all contracts, conditional sales contracts, claims, liens, encumbrances, taxes penalties and assessments of every form and nature are to be paid in order of their priority, and the balance remaining is to be paid to the stockholders, so that J. J. Sugarman Co. [49] and its successors in interest shall receive a good and merchantable title to all of the assets purchased.

5. Upon acceptance and confirmation of this arrangement by the Court, J. J. Sugarman Co., Coastal Plywood and Timber Company, and the Trustee for the latter company, shall mutually agree upon a continuation of the business operations of

(Testimony of William Steinberg.)

said Coastal Plywood and Timber Company until J. J. Sugarman Co. or its successor in interest can take full possession of all of the assets in accordance with the terms hereinabove set forth, and all profits made or losses suffered from the date of acceptance and confirmation of the arrangement by the Court, shall accrue to J. J. Sugarman Co. or its successor in interest.

6. J. J. Sugarman Co. or its successor in interest shall not be responsible for any fees, costs or expenses, by virtue of this transaction being called to their attention.

Very truly yours, William Steinberg."

Q. Mr. Steinberg, this letter is dated July 22, 1953, is that correct? A. Yes sir.

Q. And it was not deposited in the mail?

A. No sir, it was delivered personally.

Q. Delivered personally to whom?

A. Mr. Stevenot, Mr. Carr and Mr. Olson. They were all at the conference there.

Q. That was delivered by you to this conference?

A. That is correct. [50]

Q. Where was this conference held?

A. In Mr. Stevenot's office.

Q. And it was delivered on the date of the letter, is that right?

A. I believe it was the day after the date of the letter.

Q. You believe that it was——

A. I think the letter was drawn up on a Thurs-

(Testimony of William Steinberg.)

day, and Friday morning I had the conference with them.

Q. Now prior to the preparation of this letter, this offer, had you had any discussion with Mr. Wilson with regard to his commission?

A. Well the first day Mr. Wilson came into the picture and presented this proposition to me I specifically asked him whether he was to receive a real estate fee on it and he definitely said——

Mr. Olson: If your Honor please, I am going to object to any testimony with regard to statements by Mr. Wilson to this witness on the ground that it is hearsay.

Mr. McMurchie: I believe the statements of a party litigant, your Honor, a petitioner in the case, are admissible.

The Court: It is still hearsay and a self-serving declaration.

Mr. Olson: Self-serving, your Honor, and not an admission, which I believe counsel is trying to establish. [51]

The Court: I will sustain the objection.

Q. (By Mr. McMurchie): Did you have a discussion with Mr. Stevenot on the payment of the commission?

A. I very specifically discussed with Mr. Stevenot the day I brought that letter into Mr. Stevenot and Mr. Carr——

Q. (By Mr. McMurchie): May I interrupt Mr. Steinberg. When did you first discuss with Mr.

(Testimony of William Steinberg.)

Stevenot the commission of a broker on his transaction?

A. The day I brought the letter in.

Q. And you had no prior conversation?

A. No, no prior conversation.

Q. Will you relate that conversation? Who were present?

A. Mr. Carr and Mr. Stevenot and Mr. Olson, and I specifically told them at that time that Mr. Wilson told me that if this deal were accepted that he would receive a fee from the trustee—from the Coastal, and on that day Mr. Stevenot and Mr. Carr and Mr. Olson told me that unless the Court authorized them they were not in a position to pay any fees whatsoever insofar as this deal was concerned, and I specifically told Mr. Stevenot and Mr. Carr and Mr. Olson that it was Mr. Wilson that brought this deal to my office and that we were not in any position to pay him and we were not going to pay him any fees in the picture.

Q. Isn't it a fact that under the conditions of your offer of July 22nd, you would not pay Mr. Wilson any commission for bringing this matter to your attention? [52]

A. That is correct.

Mr. Steinberg, in order to fix the date when this letter was delivered, I will call your attention that July 22nd was a Wednesday.

A. Well, it was two days, then. It was a Friday that I met them so it must have been two days after.

Q. That would be before or after this letter?

(Testimony of William Steinberg.)

A. After the letter.

Q. After the letter. You had no conversation with them on the Friday before the letter?

A. No sir.

Q. Well now, Mr. Steinberg, subsequent to this conversation with Mr. Stevenot did you have any discussion with Mr. Wilson in regard to that conversation?

A. Oh I told Mr. Wilson, I think a few days later when he came in from Oroville what my conversation was with Mr. Stevenot and Mr. Carr and Mr. Olson, and he told me, "Don't pay any attention to them, the offer would be put in."

Mr. Olson: If your Honor please, the same objection.

The Court: I will have to sustain it.

Q. (By Mr. McMurchie): Subsequent to that time did Mr. Wilson make any statement to you——

The Court: Just a moment. I want to be clear. I simply am going to sustain the objection as to what Mr. Wilson said, and as to what this man told Wilson I will overrule the objection [53] as to that.

Mr. Olson: The objection was not addressed to that part, your Honor.

The Witness: Oh, pardon me.

Q. (By Mr. Murchie): Did you make any arrangement with Mr. Wilson subsequent to this conversation and this offer of July 22nd, did you make any arrangement with Mr. Wilson in regard to the payment of the expenses incurred by him?

(Testimony of William Steinberg.)

A. I believe about five months afterwards, about November of 1950—I don't know the exact date—oh, August, excuse me, August, about a month afterwards, when I was finally convinced that both Mr. Stevenot and Mr. Carr and Mr. Olson would not take care of Mr. Wilson I then told Mr. Wilson that in the event that I would receive any money from the Sugarman group or out of my percentage of the Sugarman group that I would see that his expenses would be taken care of in the sum of \$25,000.00 for him and \$10,000.00 to pay Mr. Kewin, and during my setup with the Sugarman Company I made provision for \$25,000.00 for Mr. Wilson and \$10,000.00 for Mr. Kewin until some time in January when the Sugarmans completely repudiated——

Mr. Dudley: Your Honor, could we have whatever it is the witness is testifying from?

The Witness: Certainly, go right ahead.

Mr. McMurchie: This is a copy? [54]

A. This is the original.

Mr. McMurchie: I think you have the copy.

Q. Mr. Steinberg, was this to be in lieu of any commission that Mr. Wilson was to charge?

A. It had nothing to do with any commission whatever, with regard to any arrangement he might have made with the trustee or the attorney for the trustee. It was my understanding throughout that he was in constant communication with the trustee and the attorney for the trustee in regard to this transaction. What if any arrangement he made with

(Testimony of William Steinberg.)
them subsequent to my meeting with Mr. Stevenot
I don't know.

Q. Was this arrangement with Mr. Wilson to be effective in the event a commission was paid by the trustee?

A. It was my understanding that if Mr. Wilson ever got a commission from the trustee, as far as I would have had to pay him out of my own hand for his expenses, that he would waive it.

Q. In other words, this was strictly an arrangement for the time and expenses Mr. Wilson had gone through in procuring the Sugarman Company to get interested in this transaction, is that correct?

A. That is correct, just for the expenses that was there. Mr. Wilson explained to me how long he was on this particular transaction and the thousands of dollars he spent out of his pocket— [55]

Mr. Olson: Same objection, your Honor.

The Court: Yes, I will sustain the objection as to what Mr. Wilson said.

Mr. McMurchie: This is that letter of August 25, is that correct? A. That is correct.

Q. And that is your signature?

A. That is correct, that is my signature.

Mr. McMurchie: I will introduce this as Petitioner's next in order.

The Court: It will be admitted in evidence as Petitioner's Exhibit Four.

(The document referred to was marked Petitioner's Exhibit Number Four.)

The Court: What is the date of it, August what?

(Testimony of William Steinberg.)

Mr. McMurchie: August 25, 1953, your Honor.

The Court: All right, thank you.

Mr. McMurchie: It is on the letterhead of Alex E. Wilson, addressed to Alex E. Wilson, 155 Montgomery Street, San Francisco, California.

"Dear Sir:

This is to acknowledge that you brought to my attention the sale of the Coastal Plywood Company and that I in turn brought it to the attention of N. N. Sugarman of Los Angeles who evidenced a great interest in purchasing the same. [56]

When and if N. N. Sugarman or his associates purchase the Coastal Plywood Company they have agreed to compensate me reasonably.

Out of this compensation I hereby agree to pay to Alex W. Wilson the sum of \$25,000 and to Redge Kuhen the sum of \$10,000.

Very truly yours,

William Steinberg."

Q. (By Mr. McMurchie): You say Mr. Steinberg that this was—you say that this was to be a matter of repaying Mr. Wilson for the expenses that he had been put to in bringing this matter to the attention of yourself and the Sugarman interests, is that correct? A. That is correct.

Q. How did you happen to enter into such an agreement with Mr. Wilson?

A. The reason I entered into such an agreement with Mr. Wilson, I was firmly convinced after talking to Mr. Stevenot a number of times and Mr. Olson and Mr. Carr that they wouldn't pay Mr.

(Testimony of William Steinberg.)

Wilson anything under the circumstances, and knowing the amount of work that Mr. Wilson did I told him that out of any amount of money that I would receive that I would see that his expenses would be taken care of, and I asked him what he thought his expenses were and he told me \$25,000.00, and that is what it was. [57]

Q. Now Mr. Steinberg was this offer of July 22nd which we have read accepted by the trustee of Coastal Plywood?

A. At the end of the discussion that Friday that we had it appeared that we were about a half a million dollars short of what the deal could possibly be put through. Mr. Stevenot and Mr. Olson took their accounts out and said it would be impossible, virtually impossible to get the stockholders' consent after all expenses were paid unless the offer was increased by a minimum of a half a million dollars.

Q. Did you convey that information to your parties that you represented, N. N. Sugarman?

A. I did.

Q. Did you ever receive any correspondence from Mr. Sugarman or any of his associates in regard to this Coastal Plywood?

A. Well, after the three million seven hundred fifty thousand, that we couldn't make it on that basis,—we got no encouragement, put it that way, to make it on that basis, \$3,750,000.00, I notified Mr. Sugarman what the setup was from the standpoint of the Coastal Plywood Company, and I took

(Testimony of William Steinberg.)

a trip subsequent to that time to Los Angeles and discussed the entire matter with him in detail, and at that time he called in some other associates with him, amongst whom was, I think, Mr. Margolis.

Q. Were there any conditions that the Sugarman interests set up before they would be interested in purchasing the assets of Coastal in that transaction? [58]

Mr. Olson: If your Honor please, that definitely calls for hearsay.

The Court: Just a moment. Mr. Clerk, will you move that microphone.

Now what is the objection?

Mr. Olson: The objection, your Honor, is simply that all the testimony that the witness is giving calls for hearsay statements, to which we object, and we move that all statements of that nature just given to the preceding question be stricken.

The Court: Well, does this go to the negotiations between Coastal Plywood and Sugarman in which you were the intermediary, and were they conveyed to Coastal Plywood?

A. Yes, we negotiated with Coastal Plywood from July 25, or the July date, clear up until the consummation.

Mr. McMurchie: I am approaching a new subject, your Honor. I am attempting to go into the resale which was a requirement of the Sugarman before they would complete the purchase.

The Court: Requirement of whom?

Mr. McMurchie: Requirement to Mr. Steinberg

(Testimony of William Steinberg.)

that he arrange a resale before they would be able to present a new offer to Coastal Plywood, and it is important in this case to show——

The Court: I know it is important, but the question is how does it get around the hearsay rule?

Mr. McMurchie: Well it is one of the facets of the activities of Mr. Wilson, your Honor, which were of benefit to this estate. [59]

The Court: Well is it hearsay to the subject matter of the action? That is all I want to know. My own thought is that this may be an exception to the hearsay rule in that respect, being that it is a part of the *res gestae* of the transaction.

Mr. Hildebrand: That is it, it all ties in and it all follows through, because, in other words, Sugarman insisted that we show that there be a resale of the property all arranged in advance before they would go ahead with it, and this is one step in achieving that.

The Court: Unless it is a part of the *res gestae* it is probably hearsay, though, as to the trustee and the interest of the bankrupt estate.

Mr. Olson: That is correct, your Honor. In that connection it isn't shown here that any of these matters were called to the attention of the trustee or the trustee has any knowledge——

The Court: Well I don't think that is particularly necessary if it occurred as a component part of the transaction so that it was a part of the transaction itself, or even if it led up to it it might still be admissible under the *res gestae*.

(Testimony of William Steinberg.)

Mr. McMurchie: I think it did, your Honor, just as all the other negotiations with other purchasers, not alone with respect to this matter, would certainly be admissible to show [60] the services rendered by the petitioner in the negotiation of that sale.

Mr. Hildebrand: In other words, it is our point that Mr. Wilson following this conversation even went to the extent of arranging a resale of all of this lumber to get the deal over so that these men down in Los Angeles could make a million and half before they ever got into the deal, it was all set up for them, and then the trustee takes advantage of the deal that he set up for them.

The Court: Well that, of course, is properly argument Mr. Hildebrand, but the only proposition I want to understand clearly is the relationship of this evidence to the point at issue or to the issue of the case, to determine whether or not this is a hearsay transaction or whether it comes within the exception to the rule.

Mr. McMurchie: I think they are all services performed by the Coastal Plywood in order to find a purchaser for the assets.

The Court: That, of course, may or may not be true; I mean that is one of the issues that has to be determined; but since it goes to that I would be inclined to overrule the objection and permit the testimony, and if we find out it has no relationship—I'll make the ruling without prejudice to a motion to strike and I will just have to pass on

(Testimony of William Steinberg.)

the evidence after having looked at what was said, because I deem this to be a close enough question that I should permit it to come in, and [61] then you can make such motions as you desire. You may reserve your right to move to strike it and I will make my ruling overruling the objection without prejudice to that right.

Q. (By Mr. McMurchie): Mr. Steinberg, did you receive a letter of June 30, 1953, from Mr. Barney Margolis? A. Yes I did.

Mr. Olson: If the Court please, we have examined this letter, it is a photostatic copy, and we would like to make the objection that it is not the best evidence of the letter. I assume counsel proposes to have the witness testify in regard to it and to offer it in evidence.

Mr. McMurchie: I do, yes, your Honor.

The Court: Have you asked for the original?

The Witness: I have the original—I haven't it here with me, but I have the original of this in my files, I think I have.

Mr. Dudley: If he has the original in his files, I don't understand why he went to all the trouble to prepare a photostatic copy——

The Witness: I didn't prepare it.

Mr. Dudley (Continuing): and present it here in Court. They should produce the original.

The Court: The original *is* certainly is the best evidence, and if there is going to be any argument about it I will have to sustain the objection, but

(Testimony of William Steinberg.)

I will give you the right to substitute the original in place of this. [62]

Mr. McMurchie: I would like to introduce this at this time.

The Court: Well it is not admissible in evidence. You are right up against a stone wall in that. Although I am not going to foreclose you from the opportunity to produce it if counsel wants to insist on the original. Is there any way as a practical matter this might be worked out so that you might have the original presented to you for verification and so on?

Mr. Olson: Yes, your Honor, that is the only basis for the objection. We have never seen this letter before and we want to be certain it is in existence before we——

The Court: Well, under that statement I will reserve a ruling on this objection until the time that the original is produced, but I will permit you to go ahead, and all the testimony will be stricken if the original is not produced, or unless the basis or the foundation laid for the production of secondary evidence.

The Witness: I have the original of this letter. I didn't know I should have brought it up here or I would. I was not subpoenaed—I was subpoenaed, but not duces tecum with all of the documents.

The Court: I understand that. Go ahead and ask your questions about the letter. They will be

(Testimony of William Steinberg.)

all subject to the objection and subject to a motion to strike unless the original is produced. [63]

Q. (By Mr. McMurchie): Will you read that letter for us, Mr. Steinberg?

A. "210 South Beverly Drive, Beverly Hills, California, June 30, 1953.

Mr. William Steinberg, Attorney at Law, 582 Market Street, San Francisco, California.

Dear Mr. Steinberg:

(Reading letter.)

Very truly yours, Barney Margolis."

Q. (By Mr. McMurchie): Mr. Margolis is an associate of Mr. Sugarman, is he?

A. Yes sir.

Q. Pursuant to that letter were you able to obtain resales of the assets of Coastal Plywood?

A. Well a few months subsequent to that letter, yes.

Q. And how were you first put in contact with the purchaser of these resales?

A. The ultimate sale of the timber and various things, I was put in contact with one of the principals through Mr. Wilson.

Q. And what was that principal's name?

A. His name was Fred Holm, of Gualala, California.

The Court: What is the name?

A. Fred Holm, Gualala, California.

Q. (By Mr. McMurchie): Where did you first meet Mr. Holm?

A. I met Mr. Holm through Mr. Wilson.

(Testimony of William Steinberg.)

Q. He was brought to your office? [64]

A. Yes, sir.

Q. Now you say that resales of the assets of Coastal Plywood were made?

A. That is correct.

Q. Can you tell me who purchased the various portions of the assets of Coastal Plywood and Timber Company?

A. It was divided into four parts. One portion of it was sold to Fred Holm. The mill and the equipment in the mill was sold to Morris and Smith and Larden and McCray. They formed a corporation called the California Redwood Company, I believe. A portion of the timber was likewise sold Larden and McCray and Smith and Morris under the same corporation name. They were the successors in interest to Smith and Morris and Larden and McCray. One portion was sold to Hollow Tree Lumber Company.

Q. Can you tell me what the total of the resales was?

A. Well I haven't a piece of paper here to add them up, but if my memory serves me best, at the time of the contract, the original contract that I drew up was sold as follows—

Q. That is what I am interested in, the original contracts, who were the parties to the contracts on behalf of the Sugarman Lumber Company.

A. I was originally the party to the contract and I took the contracts and assigned them over

(Testimony of William Steinberg.)
to Sugarman Lumber Company and they in turn drew their new contracts up. [65]

Q. Can you tell me who the purchasers were, what they purchased and what they purchased it for approximately?

A. Well at the time I entered into the contracts the thing was purchased as follows: The Smith and Morris and Larden and McCray bought the mill and mill equipment for \$640,000.00, and if my memory serves me best, they bought units three and four, which was two hundred and twenty million feet of timber for the aggregate amount of \$2,200,000.00, and they bought the seventeen thousand acres of land at ten dollars per acre, which is \$170,000.00, and they bought the inventory. At the time, at the statement of September, I think, 30th, or October 30th, I think they bought the inventory for the sum of \$900,000.00, and they bought the unit number one for one million three hundred and fifty thousand in the aggregate, and they bought the land for seventy thousand. Fred Holm bought unit number two for a total of \$800,000.00.

Q. Those contracts were executed?

A. They were all executed. However, subsequent to that time some of these contracts were revised upward and downward depending upon the inventory as they ultimately were shown to be as of the date of closing.

Q. At the time of their original execution, what were the resales, total value of resales? Can you

(Testimony of William Steinberg.)

tell me what the value was, what the total value was?

A. Giving credit to two hundred fifty thousand for accounts receivable and cash on hand, and giving credit for the rolling [66] stock of two hundred and fifty thousand, the total resale on the aggregate being paid back over a period of seven years would approximate seven million dollars.

Q. The resales approximate seven million dollars? A. That is correct.

Q. Can you tell me what the purchase price paid to Coastal Plywood and Timber Company was on those assets?

A. I think four million five hundred and sixty thousand, but you have to add on to that, however, about seven hundred thousand in interest which the Sugarman Lumber Company would have to pay over a period of ten years on their unpaid balance of two million eight hundred thousand dollars.

Q. Still a substantial profit to the Sugarman Lumber Company?

A. If all the contracts are fulfilled it will be a substantial profit, yes.

Q. Now can you tell me how you were first placed in contact with the Hollow Tree Lumber Company?

A. I was placed in contact with the Hollow Tree Lumber Company through Fred Holm.

Q. And how were you placed in contact with Smith and Morris?

A. They are Hollow Tree Lumber Company.

(Testimony of William Steinberg.)

Q. They are Hollow Tree Lumber Company?

A. They are Hollow Tree Lumber Company. They own it.

Q. So that all of these purchasers on the resale of these assets came to you through Fred Holm?

A. That is correct. [67]

Q. And Fred Holm came to you through Alex Wilson? A. That is correct.

Q. Now I notice that your offer of July 22nd is in the name of J. J. Sugarman Company?

A. That is correct.

Q. Can you tell me why the offer was in that name?

A. The reason it was in that name is because J. J. Sugarman was the president of the company and J. J. Sugarman Company has the financial ability and stability to fulfill any contract to that extent.

Q. The name being used by the people you transacted business with? A. That is correct.

Q. Now the final purchase was made by the Sugarman Lumber Company, a California corporation, is that correct? A. That is correct.

Q. Who composes that corporation?

A. Well at the time the corporation was organized there were no—I think N. A. Sugarman and M. Dicker and Barney Margolis, they formed the corporation without any stock issuance, and I don't think there is any stock issuance to this day in that corporation.

Q. It was formed for the purpose of taking over these assets?

(Testimony of William Steinberg.)

A. That is right, taking over these assets.

Q. So that the original offer of July 22nd and the final [68] purchasers are one and the same persons?

A. That is correct.

Q. Now included in these assets of Coastal Plywood and Timber Company was there any personal property in addition to the real property?

A. Yes, I think I stated that the trustee gave Sugarman Lumber Company credit, I believe, for cash and accounts receivable for the sum of two hundred fifty thousand plus or minus at the date of closing and rolling stock and logging equipment which the trustee did not have any special value set on, that was altogether with the mill, but in our calculations we set up a figure of \$250,000.00 as the going price at that time.

Q. Does that include the log deck?

A. No, the log deck was included in the inventory of the lumber and the log deck.

Q. What was the value of the inventory?

A. At September 30th, I believe, Coastal Plywood had a value of \$1,350,000.00, if my memory serves me right, and our value on a cash basis was \$900,000.00. So our sale was for \$900,000.00.

Q. That is the personal property?

A. No, that is the inventory and log deck.

Q. What would be the total value of the personal property? Can you give me that figure?

A. You mean the rolling stock?

Q. The rolling stock, log deck, lumber inventory?

(Testimony of William Steinberg.)

A. Well, you have to take one million seven hundred fifty [69] thousand, the book value that they put down and what we put down of nine hundred thousand and then you have to add on to that rolling stock that we put a value on of two hundred fifty thousand, and cash and accounts receivable which we received credit of, plus or minus, at the date of closing of two hundred fifty thousand.

Q. Approximately \$1,750,000.00 purchase price, is that true?

A. Well then you have to go one step further: you have the mill and mill equipment which we sold for six hundred forty thousand. They had a value on it of one million two hundred thousand on their books, which we had a fair value of six hundred forty thousand. I believe the machinery we put in had a value of around four hundred thousand, and on the buildings we placed a value of on around two hundred forty thousand. In other words, in their equipment and mill, if I might state, they had a complete redwood sawmill and a complete planing mill, which cost much more than four hundred thousand, which we placed a value on mill equipment at four hundred thousand, and the buildings and the spur track of around two hundred and forty thousand, and that is how we arrived at six hundred and forty thousand for the sale price to Morris and Smith and Larden and McCray.

(Testimony of William Steinberg.)

Q. Didn't you sell the lumber inventory and the log deck to Morris and Smith?

A. That is correct.

Q. What was the price? [70]

A. Nine hundred thousand plus or minus at the date of closing.

Q. Did you also sell the rolling stock?

A. No, the rolling stock is being sold now.

Q. What did you estimate the value of that to be?

A. We estimated two hundred and fifty thousand six months ago, but I assume a great deal of depreciation has entered into it since that time.

Q. You are not capable of placing a value on the personal property? A. No I am not.

Q. Other than the specific items you have mentioned? A. That is correct.

Q. Well then as I understand your testimony Mr. Steinberg there is no question but what Mr. Wilson is the person who brought this sale of the Coastal property to you?

A. There is no question about it.

Mr. Olson: I will object to that and ask that it be stricken, your Honor, on the ground it is a conclusion. His previous testimony is before the Court.

The Court: The objection is sustained. You can argue the question.

Q. (By Mr. McMurchie): Now in your offer of July 22nd and in your conversations with the Coastal Plywood and Timber Company and with the trustee, Mr. Stevenot, you repeatedly stated that

(Testimony of William Steinberg.)

Sugarman Lumber Company would not pay Mr. Wilson's commission, is that correct? [71]

A. I told Mr. Stevenot, Mr. Carr and Mr. Olson specifically that we would not take care of Mr. Wilson's or any other agent's commission in regard to that particular transaction.

Q. Can you tell me why Sugarman Lumber Company refused to pay the commission?

A. Well it wasn't a question of refusing, it was a question of getting an offer net to us. That we were not paying anybody except we made an offer.

Q. Who did Sugarman expect to pay the commission?

A. Sugarman didn't expect to pay commission to anybody.

The Court: Who was to pay the commission, if any, of the resale?

A. There were no commissions paid on any resales whatever. I was in a joint venture with them and that was my job to get these resales and I got these resales and I set up these resales and completed my part of the bargain insofar as the Sugarman Lumber Company was concerned.

Q. No commission was paid by either side on the resale?

A. No sir. They didn't pay them or they didn't pay me or anybody else.

Q. Have you ever been paid by the Sugarman Lumber Company? A. No sir.

Q. And you have never paid Mr. Wilson the \$25,000.00? A. No sir.

(Testimony of William Steinberg.)

Q. As I understand you to say, the Sugarman Lumber Company has [72] refused to pay you anything for your services in this matter, is that right?

A. That is correct.

Q. And they have disclaimed any joint venture relationship that you had with them?

A. They have, yes.

Q. They have disclaimed that?

A. That is correct.

Mr. McMurchie: I think that is all.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. Olson): Mr. Steinberg, when did you first meet Mr. Stevenot, the trustee?

A. Oh I met Mr. Stevenot before July 22nd many times.

Q. You were familiar, were you, with Coastal Plywood and Timber Company? A. I was.

Q. The fact that it was in re-organization?

A. Yes sir.

Q. The fact that it had large timber properties, including a mill? A. Yes sir.

Q. And you knew, did you not, that Coastal Plywood and Timber Company was the — strike that. You knew, did you not, that the trustee was seeking re-organization plans and proposals for the re-organization of Coastal Plywood and Timber Company? [73]

A. Yes I did, about a year before July—before this date.

(Testimony of William Steinberg.)

Q. Back in July of 1952 was that?

A. 1952, yes sir.

Q. It is also true, is it not, that the trustee, Mr. Stevenot, had given you various reports, maps, financial statements, etc., concerning the company?

A. In 1952 I received some maps—not maps, just a financial statement, but I received nothing from Mr. Stevenot except subsequent to July 22, 1953. I did receive statements and maps and other things, yes sir.

Q. And you had received prior to July 1953 certain inventory reports, had you not, log and lumber inventories from the debtor?

A. From Mr. Stevenot?

Q. Yes.

A. Not in relation to this transaction. I did receive from Mr. Stevenot log and lumber inventories, and I think toward the end—in the middle of 1952. Subsequent to July 22nd I did receive log reports and other pertinent information from Mr. Stevenot.

Q. In July 1953 you brought to Mr. Stevenot this Petitioner's Exhibit Three, is that correct?

A. That is correct.

Q. Isn't it a fact Mr. Steinberg that all you brought to the trustee was a draft of this tentative offer which you proposed to submit, to get his reaction to it? You also [74] submitted copies to trustees' counsel and counsel for the debtor?

A. That is correct.

Q. You wanted their reaction, is that correct?

A. That is correct.

(Testimony of William Steinberg.)

Q. And you submitted it in draft form to get their reaction, didn't you?

A. I submitted it in final form to sign it, that is correct.

Q. Isn't this the copy that you submitted to Mr. Stevenot (exhibiting to witness)?

A. I submitted the original to Mr. Stevenot and the copies were attached thereto.

Q. But the trustee did not accept this offer?

A. No sir. He said at that time—all of you said at that time it was a half of a million dollars too little.

Q. You were then acting on behalf of J. J. Sugarman Company of Los Angeles, is that correct?

A. N. A. Sugarman, that is correct.

Q. And in August of 1953 you sent to Mr. Alex Wilson this Petitioner's Exhibit Four, is that correct?

A. I didn't send it, I typed it up to him, yes, that is correct.

Q. You typed it up to him?

A. Alex Wilson typed it up and I signed it, that is correct.

Q. You gave this letter to Mr. Wilson at Mr. Wilson's request, did you not? [75]

A. Not at his request specifically, but in our conference under the circumstances I told him that it was my opinion that he wouldn't get anything at all out of Coastal Plywood as far as I could see, but whatever his costs were, whatever I would get

(Testimony of William Steinberg.)

out of the situation, out of our venture, I would see that his costs were taken care of, and I asked him if twenty-five thousand was fair and he said it was.

Q. You told him this because the trustee told you he would not pay any commission?

A. That is correct. Not only the trustee, but the attorneys likewise told me they wouldn't pay him a commission.

Q. They also told you, did they not, that Mr. Wilson was not representing the trustee?

A. I don't know whether they said that or not. What they did say was that they were not authorized under the law to provide for any commission, to pay him any commission.

Q. As a matter of fact, Mr. Steinberg, even before this letter, Petitioner's Exhibit Four, which you gave to Mr. Wilson, you had orally told Mr. Wilson you would pay him compensation, did you not?

A. I told him orally that if they didn't pay him anything I would see that his expenses were taken care of, if I got anything out of it I would pay him \$25,000.00 to take care of his expenses on the transaction.

Q. You told him you would pay him as early as July 1953, didn't you? [76]

A. No, it wasn't until August that I told him.

Q. And this agreement then was verbal which, of course, was later put in writing and is Petitioner's Exhibit Four?

(Testimony of William Steinberg.)

A. That is right, just a week or so before that when I was convinced that the Coastal wouldn't pay him anything I gave him that letter.

Q. Following that offer of yours of July 22, 1953, Mr. Steinberg, J. J. Sugarman Company dropped out of the picture, didn't they?

A. That is correct.

Q. Said they weren't interested?

A. That is correct.

Q. You then began representing a Mr. Jamisen, didn't you?

A. That is correct.

Q. Mr. Jamisen was interested in buying this property?

A. Correct.

Q. During what period did you represent Mr. Jamisen?

A. I didn't represent Mr. Jamisen, I worked with Mr. Jamisen on the same basis I worked with the Sugarman's just in September and October—September of 1953 and October of 1953, I think up to October 9th or 10th of 1953.

Q. During that period you were endeavoring to present an offer on behalf of Mr. Jamisen?

A. That is correct.

Q. Did Mr. Jamisen also lose interest?

A. Mr. Jamisen couldn't come up to his end of the deal, so he dropped out of the picture. [77]

Q. Now during this period you had numerous conversations with the trustee, did you not?

A. Oh, definitely.

Q. Got various reports?

A. Yes.

Q. —maps and so forth?

(Testimony of William Steinberg.)

A. Most beneficial cooperation from the trustee and their attorneys.

Q. During that period Mr. Steinberg on one of your visits to the trustee's office you learned that Fred Holm had once inquired of the trustee in regard to the possibility of buying a small piece of timber, didn't you?

A. No, never from the trustee. It wasn't until months afterwards that I found out that Fred Holm talked to the trustee. I found out about Fred Holm through Alex Wilson. I told—if I may explain how Fred Holm came into the picture—I told Alex Wilson that it would help the deal out a great deal from our standpoint if a portion of it could be sold. During July of that year and the first part of August of that year I was negotiating with the Union Lumber Company to see if they would take units one and two out of the picture. If they would take units one and two out of the picture, why, then we wouldn't have to worry about any portion of it, but the Union Lumber Company at that time were not in a position to take it, so they turned it down.

So at that time I asked Mr. Wilson I said, "Now, Alex, here [78] is our position in the matter: You have your in with the trustee and with Mr. Carr and that situation. Now if there is anybody that you know of that can take a portion of this timber, why, I think we could set this deal up, just so that we can be protected to the tune of at least seven or eight hundred thousand dollars, the Sug-

(Testimony of William Steinberg.)

arman people would put up," and I thought they would put up and Alex Wilson at that time said yes, he knew a man by the name of Mr. Holm in Gualala and Alex Wilson got on my telephone at that time and I can check my telephone calls to see what date he called him and he called Mr. Holm and introduced me to Mr. Holm on the telephone and he told Mr. Holm at that time that I was representing these people, the Sugarman, and that if he would come down here he could get unit two on the payment of a small amount of money, and Mr. Holm made a date, I think four or five days later, and he came down and Alex Wilson brought Mr. Holm into my office and from that day on Mr. Holm and I made the various transactions which finally consummated, and it wasn't until months afterwards, months afterwards, that I found out that Mr. Holm wrote a letter to the trustee inquiring about unit number two.

Q. Have you ever been attorney for Mr. Holm, Mr. Steinberg?

A. Yes, subsequently to that time, yes.

Q. During what period were you attorney for Mr. Holm?

A. Oh, from August or September on, middle of September. [79]

Q. (By the Court): When, what year?

A. 1953.

The Court: Now gentlemen we have arrived at the hour of five o'clock and I am not going to run

(Testimony of William Steinberg.)

the session any further tonight. I can take this matter up at nine o'clock tomorrow morning.

(Thereupon after discussion between Court and counsel the further hearing of this matter was continued to Tuesday, July 6, 1954, at eleven o'clock a.m.) [80]

Tuesday, July 6, 1954—11:00 A.M.

The Clerk: Case No. 12,223, in re: Coastal Plywood & Timber Company, further hearing on agent's commission.

Mr. McMurchie: Ready.

Mr. Olson: Ready.

The Court: Gentlemen, are you ready to go forward? Have we completely concluded as far as Mr. Steinberg is concerned?

Mr. Olson: No, your Honor, I was cross examining him.

The Court: Yes. All right, will Mr. Steinberg then take the witness stand, and you may conclude your cross examination.

WILLIAM STEINBERG

a witness for the Petitioner, resumed the witness stand, previously sworn.

Mr. McMurchie: If your Honor please, — Mr. Steinberg has produced the letter from Mr. Margolis which we were discussing at the last hearing. Counsel asked to see the original of that letter and I have it now. I ask that that letter be introduced as Plaintiff's Exhibit next in order, your

(Testimony of William Steinberg.)

Honor. This is a letter from Mr. Margolis dated June 30, 1953, which Mr. Steinberg was testifying about.

The Court: A letter from Margolis to Steinberg, is it?

Mr. McMurchie: That is correct, your Honor, dated June 30, 1953.

The Court: Let's see, the next exhibit in order—this is [83] Petitioner's exhibit, is it?

Mr. McMurchie: That is correct. We have had Petitioner's Exhibits 1, 2 and 3.

(Discussion in regard to exhibit number.)

The Court: This will be Petitioner's Exhibit 5.

Mr. McMurchie: I also ask, your Honor, permission to substitute a photostatic copy for that exhibit.

The Court: Is that satisfactory?

Mr. Olson: Satisfactory.

The Court: All right, a photostatic copy may be submitted in lieu of the original.

(The document referred to was marked Petitioner's Exhibit No. 5.)

Mr. McMurchie: I also understand that Mr. Steinberg has a correction in his testimony that he would like to make.

The Court: Mr. Steinberg, you may make it, then. What is your correction, sir?

The Witness: There are two corrections: One is at the time that letter I think is dated, July 22nd was given to Mr. Stevenot and Mr. Carr and Mr. Olson and Mr. Shannon, I believe there was a

(Testimony of William Steinberg.)

prior meeting at that time to discuss the general terms, I believe it was the Friday before, it was the 17th of July, if I remember correctly, and then subsequent to that meeting this letter was introduced—I mean given to them on July 22nd, I delivered it personally, and that was as to form also, [84] and Mr. Stevenot and Mr. Carr and Mr. Olson, after they examined that letter, Mr. Stevenot stated that that offer was at least \$500,000 too little to be submitted.

The Court: Gentlemen, we will take a brief recess.

The Clerk: To get the work sheet before we go forward, so we will get these exhibits straight.

(Recess.)

The Court: Now then, this letter has been admitted as Petitioner's Exhibit No. 5, Mr. Clerk, a photostatic copy.

All right, Mr. McMurchie, have you made all of the—that is, you have the letter offered as an exhibit, and you asked Mr. Steinberg to correct his testimony. Is that all——

Mr. McMurchie: Have you corrected your testimony as far as you are concerned, Mr. Steinberg?

The Witness: Yes, sir.

Q. You are satisfied with your testimony as it now stands? A. Yes, sir.

Mr. Olson: Shall I proceed, your Honor?

The Court: Yes.

(Testimony of William Steinberg.)

Cross Examination—Resumed

Q. (By Mr. Olson): To make sure that I understand you correctly, Mr. Steinberg, you first learned about the Coastal Plywood Company in July, 1952, is that right?

A. July of 1952, yes, some time during that period, yes sir.

Q. And you then knew that the Coastal Plywood and Timber Company [85] was a debtor in reorganization, did you not?

A. I did.

Q. And that reorganization proposals should be submitted to the trustee?

A. Yes, sir.

Q. In fact, you had called upon the trustee several times prior to July, 1953, had you not?

A. Yes, sir.

Q. And obtained certain reports and information, including a cruise report?

A. Yes, sir.

Q. And in June, 1953, you met Mr. Alex E. Wilson for the first time?

A. I believe it was in May—it either was in May—I think the early part of May, I believe.

Q. Did Mr. Wilson submit a definite proposal or offer to you at that time?

A. Mr. Wilson came in to see me, he said that the Coastal Plywood was for sale, and I asked him what his connection with it was, and he said that he sold properties for them and that he could deliver the Coastal Plywood.

I asked him for what price could the Coastal Plywood be delivered, because I knew about the Coastal Plywood.

(Testimony of William Steinberg.)

He said if he could get four million dollars for all the assets that he could put it through, and I asked him at the same [86] time what his position was in the matter, and he said he was a real estate broker.

I said, "How will you be paid?"

He said, "I will be paid a regular real estate commission from the trustee."

I said, "Are you authorized to give me all the necessary information in connection with it?"

And he said he was.

Mr. Olson: If your Honor please, I will move that the statements of Mr. Wilson to Mr. Steinberg be stricken on the ground they are self-serving.

The Court: They will be stricken.

Q. (By Mr. Olson): Then on July 22, 1953 you brought to the trustee a preliminary offer on behalf of J. J. Sugarman Co. to buy these assets, is that right?

A. I think it was before July 22. After the last time we were here, Mr. Olson, it was called to my attention they asked for a form. I remember they had another meeting before July 22—I think it was—to the best of my recollection it was on the 17th when we met and we discussed it informally—I believe a letter informed me, they asked me about the form that I wrote, wherein they discussed the amount and everything connected with it.

Q. You had been in to see the trustee several times, hadn't you—— [87] A. Yes, yes sir.

Q. ——during that year prior to July, 1953?

(Testimony of William Steinberg.)

A. Yes.

Q. Now this offer that you brought in on July 22, 1953, was to buy the assets for \$3,750,000, is that correct?

A. That is correct.

Q. And did the trustee accept this offer?

A. The trustee didn't accept the offer. It was presented to him in that way. He said \$3,750,000 wouldn't take it, that they needed at least \$500,000 more, not only to cover the indebtedness outstanding, but to take care of the stockholders and their indebtedness, at least up to \$4,250,000.

Q. In other words, the trustee told you it would take at least \$4,250,000, is that correct?

A. That is correct, according to their statement it would take a minimum of that in order to clear everything up.

Q. A quarter of a million dollars more than Mr. Wilson had indicated?

A. That is correct.

Q. Now, Mr. Steinberg, you testified last time that you had called upon the trustee on July 24, 1953, two days after the offer was brought in, and in the course of this meeting the trustee told you, did he not, that Mr. Wilson would not receive any compensation from him?

A. At the time I brought the letter in, the original form letter, I think it was before the one submitted on July 22, [88] wherein you and Mr. Carr and Mr. Stevenot was there, I brought up the question that Mr. Wilson brought this matter to our attention and it was my understanding that he was to get a fee out of it, I mean a regular commis-

(Testimony of William Steinberg.)

sion, and Mr. Stevenot and you and Mr. Carr were very emphatic and stated specifically that Mr. Wilson was not to receive any fees or could not receive any fees.

Q. You relayed that statement by the trustee to Mr. Wilson, did you not? A. Yes, sir.

The Court: When was this?

A. This was after July 22, when I finally brought the letter to Mr. Stevenot.

The Court: Was it during the final negotiations, or during the preliminary negotiations?

A. It was all during the preliminary negotiations.

Q. (By Mr. Olson): And then, Mr. Steinberg, you agreed with Mr. Wilson, first verbally and then in a letter, that you would pay Mr. Wilson, \$25,000 for bringing the debtor to his attention, isn't that correct?

A. No, that wasn't it. After Mr. Wilson told me, weeks afterwards, that he didn't think that the trustee would pay him any fees under the picture, I told him that I was getting a substantial fee out of it if the thing went through, and that I would take care of his costs, take care of his—\$25,000 was what Mr. Wilson's costs were—he came in and showed me a tremendous [89] volume of letters and everything that went with it—and Mr. Kuhen, who brought Mr. Wilson to my office, would be taken care of to the sum of \$10,000, and I said, "Mr. Wilson, you draw up your own agreement as

(Testimony of William Steinberg.)

you see fit and I will sign it," and I believe he drew that little agreement and I signed it.

Q. You are speaking of Petitioner's Exhibit 4, the letter of August 25, 1953, is that correct?

A. Yes.

Q. Who drew up this letter, did you or Mr. Wilson?

A. No, Mr. Wilson drew up this letter.

Q. Did you give him the language to put in the letter?

A. Yes, I did.

Q. Did you give him this language, Mr. Steinberg:

"When and if N. N. Sugarman or his associates purchase the Coastal Plywood Company they have agreed to compensate me reasonably"?

A. That is correct.

Q. And the final paragraph:

"Out of this compensation I hereby agree to pay to Alex E. Wilson, the sum of \$25,000, and to Redge Kuhen the sum of \$10,000"?

A. That is correct.

Q. (By the Court): Who directed that that language be put in the letter?

A. I did myself. [90]

Q. (By Mr. Olson): You had an arrangement with N. N. Sugarman whereby you would be compensated for your efforts, is that correct?

A. I had no arrangement with N. N. Sugarman, my arrangement with N. N. Sugarman and Mr. Margolis, we were joint adventurers in the purchase of the Coastal Plywood Company provided I per-

(Testimony of William Steinberg.)

formed certain accomplishments, which I did, and I was to participate to the extent of 25 per cent of the interest, and Mr. Margolis was to get 25 per cent of the interest, and Sugarman was to get 50 per cent of the interest.

This was all verbal, and between the time I gave him the letter, I gave the letter to Mr. Stevenot, and the time I wrote this letter to Mr. Wilson, our arrangement was that if the thing was ever consummated, if the deal ever consummated, I would do all I promised to do, I was to receive 25 per cent, out of which I told Alec I would take care of his expenses to the tune of \$25,000 and Mr. Kuhen his expenses to the tune of \$10,000.

Q. This 25 per cent interest that you speak of as being yours, that was compensation for your services?

A. No, that was my interest. I had no compensation coming from that.

Q. This language in the letter that "N. N. Sugarman had agreed to compensate you reasonably", is that language incorrect, then? [91]

A. That language is incorrect.

Q. For what did you obtain your 25 per cent interest?

A. I haven't obtained anything yet.

Q. For what do you claim that 25 per cent interest?

A. Four reasons: One, bringing the transaction to the attention of Sugarman; two, engineering the complete purchase and sale of the Coastal Plywood

(Testimony of William Steinberg.)

Company; three, actually selling the Coastal Plywood Company for them during the thing, and, four, providing the funds so that the money could be put up for the purchase of the Coastal Plywood Company.

Q. Are you speaking of your funds?

A. Not my funds, no, but funds that came from the sales to——

Q. In other words, if I understand you correctly, this 25 per cent interest was for services rendered by you?

A. That is correct.

Q. Now, after you submitted this offer on behalf of N. N. Sugarman Company, N. N. Sugarman Company dropped out of the picture and then you started representing Mr. Jamieson?

A. I never represented Mr. Jamieson, I brought—originally it was the N. N. Sugarman group originally, and following that—I don't know whether you remember or not, I wrote you a letter stating that the people who were involved were N. N. Sugarman, a man by the name of Jamieson, a man by the name of Sam Steinberg, no relation to myself, and Margolis, they were to put up \$3,750,000 instead of what it was worth, and when I informed [92] them it would take another half a million dollars to do it, N. N. Sugarman dropped out of the picture, Sam Steinberg dropped out of the picture and Margolis dropped out of the picture, and that left Jamieson remaining.

Jamieson happened to be a lumber person, one who understood the particular situation. So I picked

(Testimony of William Steinberg.)

up Jamieson with these people left off, and then we went ahead and tried to develop the situation until they put in a proposal to the trustee, which was wholly unacceptable, and when that proposal was wholly unacceptable, then I brought back N. N. Sugarman and Margolis into the picture, and through the Sugarman Lumber Company finally consummated the transaction.

Q. Going back a second, Mr. Steinberg, you say you did not represent Mr. Jamieson?

A. No, sir.

Q. Weren't you attempting to develop an offer on his behalf?

A. We did develop an offer. I was with Jamieson on the same basis, on a joint venture basis.

Q. Mr. Jamieson wanted to buy the assets of Coastal? A. That is correct.

Q. And you were attempting to develop a plan under which he could buy those assets?

A. That is correct. They wouldn't accept—I mean Jamieson and his group wouldn't follow through, so they——

Q. During what period did you act on behalf of Mr. Jamieson? [93]

A. I acted from I would say August the 15th, 1953 or maybe the end of August, 1953 to about the first week of October of 1953.

Q. And during that same period from the end of August to October, 1953 you negotiated various contracts with a Mr. Fred Holm, of the Hollow Tree Lumber Company and others for resale of

(Testimony of William Steinberg.)

various timber and other properties of the debtor, didn't you? A. No, sir.

Q. What was your answer? A. No, sir.

Q. Did you negotiate such contracts?

A. No, sir, just with Mr. Fred Holm on a portion of the property only.

Q. Just with Mr. Holm. When did you negotiate a contract with Mr. Fred Holm?

A. To the best of my recollection, in the middle of August.

Q. When did you first meet Mr. Holm?

A. I met Mr. Holm I would say in July, at the end of July. If I had my file here I could look through it and I could tell you more accurately.

The Court: Well, is your file in the room?

A. Yes, sir.

The Court: Well, step down and get it.

(The witness leaves the witness stand and procures his file and returns to the witness stand.) [94]

A. Yes, sir, this is it.

Q. (By the Court): Now, will you speak to the microphone, please?

A. Yes, sir, that is the letter.

Q. (By Mr. Olson): My previous question was, when did you first meet Mr. Holm?

A. To the best of my recollection, that would be the early part of August.

Q. Early part of August of 1953?

A. Yes, sir.

Q. Did Mr. Fred Holm ever enter a contract

(Testimony of William Steinberg.)

with you to purchase certain properties then owned by Coastal Plywood and Timber Company?

A. Yes, sir.

Q. Exactly what properties did he agree to purchase?

A. He only agreed to purchase Unit No. 2.

Q. Unit 2? A. Yes.

Q. That is a timber tract owned by the debtor?

A. That is all.

Q. That is only about one-sixth of the total property owned by the debtor, is it not?

A. That is all, very, very small part.

Q. Now, have you checked your file to find out the exact date on which you entered into this contract with Mr. Holm? [95] A. Yes.

Q. What was that date? A. August 25.

Q. August 25th?

A. August 25, 1953, I believe.

Q. You had been trying to sell this timber to the Union Lumber Company——

A. That is correct.

Q. ——prior to that date, hadn't you?

A. Prior—that was during the month of July.

Q. I believe you testified at the last meeting that your negotiations with the Union Lumber Company were also in August of 1953?

A. Yes, sir, that is right, the first part of August, that is correct. It was either at the end of July, Mr. Olson, or the first week in August, to the best of my recollection.

(Testimony of William Steinberg.)

Q. Did your negotiations with the Union Lumber Company collapse? A. Yes, sir.

Q. And it was after that that you commenced negotiations with Mr. Fred Holm?

A. After they collapsed I talked to Mr. Wilson about the situation and I told him at that time that unless the—some of the investment which might be put up were protected, that if he had any other sales that would be available, why, at least a portion of the sales, why, we would be able to proceed [96] further on the venture.

Q. Exactly when was that?

A. That was—I think the first or second week in August. I haven't my telephone record, otherwise I could tell you the exact date it was.

Q. Now, when you entered into this agreement with Mr. Fred Holm on August 25, 1953, you were acting on behalf of Mr. Jamieson, were you not?

A. At that time?

Q. Yes.

A. No, it wasn't at that time, no, sir, it wasn't until after that.

Q. If I understand you correctly, you represented Mr. Jamieson from the end of August until some time in October, 1953?

A. It was after the end of August until some time in October of 1953, that is correct.

Q. Now, Mr. Fred Holm originally was going to pay \$9.00 per 1000 board feet of this timber in Unit 2, was he not?

A. Not at the time I was negotiating with him,

(Testimony of William Steinberg.)

it wasn't until months afterwards that I found out he wrote a letter to the trustee. It was prior to that time that he offered \$9.00 to the trustee per thousand.

Q. Did Mr. Fred Holm ever offer you to pay \$9.00 per thousand board feet for this timber?

A. Not to me personally, no sir. [97]

Q. How much did he agree in the agreement to pay for this timber in Unit 2?

A. He agreed—the price was \$8.50 per thousand.

Q. Sugarman Lumber Company was going to get \$8.00 per thousand for that timber, weren't they?

A. Yes. The reason for that was for services rendered, and the services rendered was what Mr. Fred Holm performed for and on behalf of Mr. Sugarman. The price was \$9.00, yes sir.

Q. That extra 50 cents per thousand, was that going to be received by you? A. No, sir.

Q. —for compensation for your services?

A. No, sir, there was no agreement on services of any kind, form, shape or nature from anybody, Fred Holm, Alex Wilson or Jamieson, or anybody, except through my interest with the Sugarman group.

Q. The Sugarman Lumber Company was only going to receive \$8.00 per thousand for that timber in Unit 2? A. That is correct.

Q. And Fred Holm was going to pay \$8.50?

A. That is correct, originally, yes, sir.

Q. Now you said, I believe, that you did not

(Testimony of William Steinberg.)

negotiate contracts with the Hollow Tree Lumber Company or Mr. Mores and Mr. Smith in that company?

A. Not at that time. It was after October 18th when all our [98] contracts were negotiated.

Q. Did you negotiate those contracts?

A. Yes, Mr. Holm got the contacts, Mr. Holm got Bill Mores and Bill Smith and Laird and Laitre and he brought them to my office and from there I negotiated all the contracts, yes, sir.

Q. These people were all brought into the picture by Mr. Fred Holm? A. That is correct.

Q. Who were you representing or acting on behalf of at that time? A. The Sugarman group.

Q. Who negotiated and prepared the contracts with Hollow Tree Lumber Company, Mores, Smith and these other people?

A. The final contracts were negotiated by a man by the name of Dicker of Los Angeles.

Q. Whom did Mr. Dicker represent?

A. Mr. Dicker represented the Sugarman Company, Nate Sugarman, Margolis and myself.

Q. Did Mr. Dicker also negotiate the final contract with Mr. Fred Holm? A. Yes, sir.

Q. This contract that you had previously negotiated in your name with Mr. Fred Holm, that expired, did it not?

A. Yes, sir. All the contracts that were made in my name were made in a brief and informal manner. The basic plan [99] was on there. When the formal contracts were drawn up they just took

(Testimony of William Steinberg.)

the basic plan that was there and put it in the final contracts. The terms, conditions, sales price and everything else was the same. Dicker just made the final contracts.

Q. Now, if I understand you correctly, Mr. Steinberg, Mr. Wilson's contract with your proposal, then, was limited to calling the debtor to your attention in June, 1953, and introducing Mr. Fred Holm to you some time in the latter part of August, 1953, is that correct?

A. Not the latter part of July, the first week in August.

Q. The latter part of July?

A. And bringing the necessary information, that is correct.

Q. And for this you agreed to pay him \$25,000?

A. What I agreed to pay him was \$25,000 for expenses, whatever he had involved in the expenses, yes, sir, and \$10,000 to Mr. Kuhen, that is correct.

Q. Did Mr. Wilson show you a statement of expenses which showed that he had spent \$25,000?

A. No, he didn't spend \$25,000, he told me he spent in excess of \$8,000, which I could well believe, knowing what he did and who was under the picture, and I knew other expenses were involved, and I said, "Would \$25,000 cover it?" And that was it.

Q. Do you know what expenses he incurred in bringing to your attention Coastal Plywood and Timber Company, and in introducing Mr. Holm to you? [100]

A. No, sir, I do not.

(Testimony of William Steinberg.)

Q. Were those steps taken in San Francisco?

A. Yes, sir.

Q. He introduced Mr. Holm to you in San Francisco?

A. Well, over the telephone in San Francisco, yes, sir.

Q. And he first spoke to you in San Francisco, is that correct? A. Yes, sir.

Q. Mr. Wilson at his office in San Francisco?

A. Correct.

Q. Now, when did N. N. Sugarman come back into the picture?

A. October—if you wait just a moment I will give you the exact date. (Referring to papers.)

The 16th of October.

Q. October 16? A. Yes, sir.

Q. Now, at that time Mr. Steinberg, Mr. Sugarman and his associates started negotiating directly with the trustee, and with Mr. Carr and myself, did they not?

A. No, sir, they did not, not until months afterwards—weeks afterwards.

Q. What date did they start negotiating directly with the trustee?

A. I believe I brought them in at least between two and three weeks afterwards, after October 18.

Q. Do you know that these gentlemen, Mr. Sugarman and his associates, did not negotiate with the trustee commencing October 16, 1953?

A. Definitely.

Q. How do you know that?

(Testimony of William Steinberg.)

A. Because——

Q. Isn't it a fact, Mr. Steinberg,——

A. Let me just answer the question, I will tell you.

On October 16th I talked to Mr. Sugarman over the telephone and I told him what the status of the whole situation was with regard to Coastal, and at that time he suggested that I get hold of Barney Margolis and meet with him and discuss the problem with him, which I did on October 18th.

We then got hold of Nate Sugarman and Nate Sugarman came to San Francisco on the 18th and we met at the Fairmont Hotel—on the 19th, rather, we met on the 19th, and we outlined the whole plan on the 19th, and Mr. Sugarman went back to Los Angeles.

At that time I submitted to him the basic plan which was ultimately adopted to Mr. Sugarman and Mr. Margolis and set up the entire plan of purchase, payment on the purchase and how it should be paid and where the funds were coming from.

I believe that Mr. Dicker—no, I believe Mr. Sugarman—in fact that night—I think he came back on Wednesday—he came back on the 21st, I believe, and at that time Mr. Dicker [102] came up for the first time. He met Mr. Sugarman, we introduced Mr. Dicker to Mr. Sugarman and we employed Mr. Dicker at that time to formalize the contract and formalize the plan and go into detail of how to consummate the transaction.

(Testimony of William Steinberg.)

Q. You know, do you not, Mr. Steinberg, that the trustee and Mr. Carr and myself negotiated directly with Mr. Sugarman, Mr. Dicker and Mr. Margolis for a period of approximately six weeks?

A. That is correct.

Q. You know we had expensive negotiations with regard to the security for the balance of the purchase price, do you not?

A. That is correct.

Q. Mr. Steinberg, isn't it a fact that Mr. Sugarman, Mr. Dicker and Mr. Margolis told you that you had no authority to represent them some time in October of 1953?

A. No, sir, they said that in December of 1953 after the deal was all consummated, or at least the plan was all consummated, all the monies and all the funds were turned over to them, and at that time they said that I wasn't to represent them—I never represented them at any event, as far as the lawyers are concerned, I was a joint adventurer with them on this whole situation.

Q. Do you know when Sugarman Lumber Company submitted its offer to the trustee to purchase the assets of the debtor?

A. Yes, sir, I can tell you, I can give you the exact date. [103] It was in December—they submitted the offer after I came down and got them \$50,000 so they could put up the fifty thousand.

Q. Was it December 12, 1953?

A. That is correct. The money was turned over to them on December 10 and on December 12 they put up the money and put up the offer.

(Testimony of William Steinberg.)

Q. Following approximately 6 weeks' negotiations with the trustee?

A. That is correct, on a plan that was submitted—basically the plan that was submitted to your office weeks before the Sugarmans came in.

Q. Now, this contract that you had negotiated with Mr. Fred Holm, that was actually executed and was between Mr. Holm as one party and you as the other, is that correct?

A. That is correct. It wasn't a contract that was executed, it was an offer that was made.

Q. It was an offer?

A. Yes, sir. Just one moment. The formal contract was executed on February 4th of this year.

Q. Of '54? A. That is correct.

Q. This contract provided for the purchase of certain timber by Mr. Holm?

A. That is correct.

Q. Unit 2, as you have described it, is that correct? [104]

A. A portion of Unit 2, yes, sir.

Q. And it provides for payment, does it not, for the timber only as it is removed from the property?

A. That is correct.

Q. Over a long period of years?

A. Many years, yes, sir.

Q. And the same is true of these other contracts with the Hollow Tree Lumber Company and the others?

A. That is correct, they are long term contracts, yes, sir.

(Testimony of William Steinberg.)

Q. When did you first meet Mr. William Mores?

A. I met—if you will wait a moment I will tell you the exact date. (Referring to papers.)

October 27th.

Q. October 27th?

A. It is either the 25th, 26th or 27th, not later than the 27th, and I think it was the 25th.

Q. And at that time you told Mr. Mores that you were putting together an offer to buy the debtor's assets, is that correct?

A. No, sir, I did not.

Q. Did Mr. Mores know that you were putting together an offer? A. No, sir.

Q. Did you tell Mr. Mores that you were acting on behalf of Mr. Jamieson in developing a plan of reorganization?

A. No, that was after Jamieson dropped out of the picture that Mores and Smith came in on the picture. Mores and Smith [105] always knew at all times that it was the Sugarman group who were to purchase the assets of Coastal Plywood.

Q. Do you know, Mr. Steinberg, that all of the original arrangements with Mr. Holm, Hollow Tree Lumber Company, Mr. Mores, Mr. Smith and the others were renegotiated after you dropped out of the picture?

A. No, they were never renegotiated after I dropped out of the picture. They might have modified the contract after the first of the year. When the original contract was signed at the time the offer was made, the basic propositions, all of the

(Testimony of William Steinberg.)

contracts I drew up were right there with no differences whatsoever except as to form.

Q. Those contracts——

A. I beg your pardon?

Q. Excuse me, go ahead.

A. As to form only. The purchase price, the sales price, everything was exactly identically the same as when the original contracts were negotiated, except it was put into form, and what happened after the first of the year I don't know. There might have been some modifications.

Q. After the first of 1954?

A. That is correct, but at the time the offer was made it was identical.

Q. Do you know when the sale to the Sugarman Lumber Company was closed? [106]

A. The sale from whom?

Q. From the trustee of Coastal Plywood & Timber Company to Sugarman Lumber Company?

A. Well, I believe it was a couple of months ago, three months ago at the most.

Q. In April of this year, was it not?

A. Yes, sir.

Q. You don't know what happened to those contracts after the first of the year?

A. Well, to be more specific, what happened to the contracts after the confirmation of the sale in April, no I don't, no.

Q. (By the Court): He wants to know what happened after the first of the year.

A. Oh, I don't believe—just reminding me, I

(Testimony of William Steinberg.)

don't believe they were modified, if they were at all modified, until after April of this year.

Q. (By Mr. Olson): Did you know that the contracts in effect at the first of the year expired by their own terms on March 12th of this year?

A. Yes, now as you remind me of the whole thing, yes, sir, and they extended the time within which to execute the contracts, and furthermore—with the exception of Mr. Holm—and furthermore I do believe now that they did change the contracts from a tax standpoint—with the same terms were there, as far as I remember correctly—— [107]

Q. Just a moment, Mr. Steinberg, you didn't participate in negotiating those changes, did you?

A. No, sir, I did not.

Q. Did you ever see those final contracts?

A. No, sir.

Q. So you don't know what is in those final contracts, do you? A. No, sir, I don't.

Q. Do you know who owned Sugarman Lumber Company when the trustee's plan of reorganization was confirmed and consummated in April of this year?

A. Well, so far as I know, and I checked the records, there were no shares of stock issued whatsoever. They only had a holding agreement between the four people.

Q. What record are you speaking of, Mr. Steinberg?

A. The corporation, the Department of Corporations' records as of today—I mean as of the last

(Testimony of William Steinberg.)

time I talked, which was last week, Sugarman Company had no stock issued whatsoever. They had a holding agreement between four people—five people: Sam Rudolph has a third interest in the company, Abe Sugarman has one-sixth interest in the company, Nate Sugarman has one-sixth interest in the company, Nate Dicker has one-sixth interest in the company, and Margolis has one-sixth interest in the company. The assets which the Sugarman Company own at the present time, as I understand they changed their name to [108] S. G. Rudolph Company—

Q. Did you ever represent Mr. Rudolph or act on his behalf? A. No, sir, never.

Q. Now, Mr. Steinberg, you were one of the leaders in April of this year of an attempt to set aside the trustee's second plan of reorganization, were you not?

A. No, sir, I was not a leader.

Q. Didn't you endeavor to present a proposal and get the Sugarman plan defeated?

A. I did, I endeavored to present a proposal, yes, sir.

Q. Weren't you the person who prepared the proposal that was brought into Judge Murphy at the hearing in April of this year?

A. Prepared the proposal?

Q. Yes. A. Yes, sir, I did.

Q. And that was presented by Mr. Brooks Berlin? A. That is correct.

(Testimony of William Steinberg.)

Q. You intend to file a suit against Sugarman Lumber Company, do you not, Mr. Steinberg?

A. That I don't know. I haven't determined what my course of action will be.

Q. You have so stated to both the trustee and myself, have you not?

A. That is correct, and also to Mr.——

Mr. Olson: I believe I have no further questions, your Honor. [109]

The Court: Do you have any questions?

Mr. Hildebrand: Yes, a few.

The Court: All right, Mr. Hildebrand.

Redirect Examination

Q. (By Mr. Hildebrand): Now, to get the situation clear, at the present time the Sugarmans or Dicker or Margolis or any of these people, Rudolph or any you have mentioned, have repudiated any deal that was ever made with you, is that right?

A. A hundred per cent, yes.

Q. And so far as this arrangement, this letter that you gave to Alex Wilson was concerned, about \$25,000, that was not to cover any brokerage fee, was it?

A. No, sir, it was not. My understanding explicitly when Mr. Wilson came in the deal he was to be protected on the brokerage fee.

Q. And do you know what the usual brokerage fee is in a percentage way for timber deals?

A. I am not familiar, no, I do not.

(Testimony of William Steinberg.)

Mr. Dudley: I wish to object, Mr. Steinberg has not been qualified as an expert witness——

The Court: He said he doesn't know.

Mr. Hildebrand: Well, we will prove by other witnesses what that is, your Honor, that it is 5 per cent.

Q. But you are not familiar with that, not being a brokerage man yourself? [110]

A. No, sir, I am not.

Q. So far as you are concerned then, this conversation that you had with Alex Wilson in connection with his \$25,000 was that if you got anything out of the deal as a joint venturer with these other boys, that you felt he had done so much work you wanted to see he got that much, is that the idea?

A. Yes, sir.

Q. Now, was he the man that exclusively beyond anyone else contacted you with Mr. Holm?

A. That is correct. That is the way I knew Mr. Holm.

Q. And then was Mr. Holm the man who made all the rest of the contacts?

A. Yes, sir, he did all the extra work with everybody, he was the timber expert in this situation.

Q. So so far as the matter stands today then, so far as you know, nobody wants to pay anything to anybody for putting the deal over, is that right?

A. That is correct.

Q. The Sugarmans have repudiated you?

A. Exactly.

(Testimony of William Steinberg.)

Q. They don't want to pay you anything at all for what you have done? A. No, sir.

Q. And they don't want to pay Mr. Wilson anything? [111] A. No, sir.

Q. And the trustee doesn't want to pay Mr. Wilson anything?

A. No, sir, the trustee told me that.

Q. So they want to get the benefit of the deal that has been put over for the sale of this timber to Mr. Holm and his associates——

A. Exactly.

Q. ——and pay nobody anything, is that it?

A. Yes, sir.

Mr. Olson: Just a moment, your Honor, I object to that as argumentative.

The Court: That question is argumentative. The answer will be stricken.

Mr. Hildebrand: Yes.

Q. And so far as you are concerned, you never undertook—did you ever undertake or discuss with the Sugarmans the payment of any commission to Mr. Wilson?

A. No, I never have. They always repudiated Mr. Wilson under any circumstances, and then——

Q. And so far as they as the buyers are concerned, did they ever agree to pay any commission to anybody for the purchase of this?

A. No, sir, not that I know of, no, sir.

Q. The only agreement that you had with them was not in the nature of commission, was it, is that correct? [112]

(Testimony of William Steinberg.)

Q. It is simply that you claim that you were a joint venturer? A. That is correct.

Q. And on that you have no written agreement?

A. No, sir.

Q. And whether or not you will file suit or prevail in the suit depends, I take it, on whether or not a case can be made out under the circumstances to support your joint venture?

A. That is correct.

Q. But at the moment you have no money from this joint venture? A. No, sir.

Q. You are in no position to pay any funds of any kind to Mr. Wilson for anything he may have done in the matter?

A. Or to anybody else, that is correct.

Q. And so far as you are concerned, in the connection that you had with the matter, if it hadn't been that Mr. Wilson contacted you and gave you the data so that you could see Mr. Holm, could you have put the deal over?

A. If it weren't for Mr. Holm the deal could never have been made. He actually made the deal a hundred per cent, and they even repudiated Mr. Holm, the Sugarman's did, but he made the deal, for us all, and Mr. Wilson got Mr. Holm for us, and if the stockholders got anything out of it they owe it all to Mr. Holm, and if the trustee gets anything out of it they owe it to Mr. Holm.

Q. And Mr. Wilson was the man who got Mr. Holm? [113] A. That is right.

Q. So that so far as this case is concerned and

(Testimony of William Steinberg.)

what you know about it and what has been done, the deals that were made both for the sale of the timber and the resale of the timber were initiated through Mr. Wilson and through the contact with Mr. Holm, is that right? A. Yes, sir.

Mr. Dudley: I object to that as leading and suggestive. All of these questions, every question that has been asked recently has been leading and suggestive all the way through. The answer was supplied by the attorney before the witness had a chance to answer.

Mr. Hildebrand: Well, it is more or less in the nature of summary, your Honor, but I will reframe the question. Let me put it this way:

Q. In your connection with these transactions did anybody other than Mr. Wilson have anything to do with getting you in touch with Mr. Holm?

A. No, sir.

Q. And then so far as the substantial part of the deal was concerned, the main portion of the sales, who helped you in getting those lined up?

Mr. Dudley: I object to that, your Honor, that calls for a conclusion as to what is meant by "a substantial portion of the deal." [114]

The Court: I will overrule the objection.

The Witness: What was that question, please?

Q. (By Mr. Hildebrand): Who helped you to get the major portion of the contacts for the sale of the timber?

A. Well, Mr. Holm—after Mr. Wilson brought Mr. Holm to my office, Mr. Holm did all the work

(Testimony of William Steinberg.)

and he got the people together, and between his work and my work and everything else for everybody to make the contracts fair and equitable, why, that is what accomplished the sale.

Q. Who were those people specifically, and what amounts of timber did they take?

A. Well, Mr. Holm—the whole timber was sold, the whole 500,000,000 feet was sold out. Mr. Holm took Unit No. 2.

Q. How much was that?

A. 152,000,000 feet, and the Hollow Tree Lumber Company took 150,000,000 feet.

Q. That was through Mr. Holm?

A. Oh, Mr. Holm engineered it, he did it all. And Mr. Laird and Laitre—Laird and Laitre and Smith and Mores together, under a corporation named the California Plywood Company, I believe, they took 220,000,000 feet, and that took up the entire of all the timber that was there. Mores and Smith and Laird and Laitre also bought the mill and bought the mill equipment, which Mr. Holm engineered.

Q. All right, then. Now, aside from—— [115]
The Court: Is that Holm or Holmes?

A. Holm, H-o-l-m, your Honor.

Q. (By Mr. Hildebrand): Aside from Mr. Holm, Mr. Wilson and yourself, was there anybody else in this picture at all? A. Nobody whatever.

Q. Did anybody else help to sell any timber and help this trustee to get this deal over besides——

A. Nobody that I know of.

(Testimony of William Steinberg.)

Q. No broker or anyone put the deal over?

A. No, sir, outside the trustee and the attorneys for the trustee.

Q. And when the Sugarman, and whatever name they finally wound up with, or with whatever corporation they finally wound up, did they put the deal through with the assistance of anybody other than yourself——

A. No, sir——

Q. ——from their end of it?

A. No, sir—well, I will take that back. Mr. Rudolph came in the picture—I believe he was an interloper afterwards—he is a brother-in-law of Mr. Sugarman, which he testified in court, and he came in the picture and he increased the basic price by the sum of \$100,000, which the Sugarman ultimately met to put the deal over, and then I believe Mr. Rudolph did advance certain sums of money to the Bank, for which he took security on the rolling stock. [116]

Q. Was that after you had called the deal to the attention of the Sugarman?

A. Oh, that was the final consummation of the deal, after all the sales were made and deposits were put up.

Q. So if anybody is to be paid any commission for putting the deal together in this matter——

Mr. Dudley: Just a moment, if your Honor please——

The Court: Well, let him ask the question.

Q. (By Mr. Hildebrand): Are there any people you can call to the attention of the court other than

(Testimony of William Steinberg.)

the ones we have mentioned who did a bit of work in this connection?

A. No, sir, not that I know of.

Q. On either side? A. No, sir.

The Court: Just a moment, I want to be sure; you were going to object. Did you intend to object to that question?

Mr. Dudley: No, your Honor.

The Court: All right.

Q. (By Mr. Hildebrand): Now, on the final end of it, and then I think that is all I want to ask, so far as the Sugarmans are concerned, after the proposal was made that they should buy, did they insist that you get the lumber resold before they would buy it?

A. Definitely. In other words, before the offer was made the condition precedent was that everything be sold out in [117] advance and everything be tied up and all the deposits be put up and all the contract forms signed, and that is exactly what was done.

Q. So did the Sugarmans have to put up a dime on the deal?

A. Well, the Sugarmans didn't put up any money whatsoever as such, but it is my understanding that subsequently, however, in April of this year, I believe, that Sam Rudolph made a loan of certain sums of money to take care of certain obligations again, which he got the security of the rolling stock.

Q. After the property had been resold?

(Testimony of William Steinberg.)

A. That is correct.

Q. And the lumber was resold for how much more than the original sale?

A. Well, if the contracts were as we originally entered into them without any modifications, the total purchase price, I believe, was \$4,550,000, and I believe the gross total sales price of everything was, I believe, \$7,000,000.

However, there is an interest factor that has to be deducted from the gross price of about \$600,000, so they had a potential of about \$2,000,000 profit, the Sugarmans did.

Mr. Dudley: If your Honor please, I would like to inquire into the relevancy of this so far as the question before us.

The Court: I don't know that that is particularly relevant, Mr. Hildebrand. It all occurred subsequent. [118]

Mr. Hildebrand: Well, the only purpose is this, your Honor, that in order to put the deal over, the contacts——

The Court: That phase of it is germane, what the income was——

Mr. Hildebrand: Oh, yes.

The Court: ——what was made after this by way of profit is immaterial.

Mr. Hildebrand: In other words, to close up the deal, and I think this is the final question on the matter, to close up the deal and to make the deal it was necessary not only initially to sell the lumber but then to resell it?

(Testimony of William Steinberg.)

A. That is correct.

Q. And in connection with the resale was it Mr. Holm and his associates who put over the resale?

A. That is correct.

Mr. Dudley: That is leading and suggestive, your Honor, and I would like to object to it.

Mr. Hildebrand: I don't think there is any question about it. Is there any argument about it?

Mr. Dudley: I don't know, but you might let the witness answer.

Mr. Hildebrand: All right.

A. Well, the resale was made first to Mr. Holm and Mr. Holm got Smith and Mores and Laird and Laitre, and the entire thing was sold out through the efforts of Mr. Holm, and ultimately [119] I came into the picture and took the contracts and worked them out, put the terms down which I knew were acceptable.

Mr. Hildebrand: I think that is all.

The Court: Any further cross-examination?

Recross Examination

Q. (By Mr. Olson): Just a few questions, your Honor. If I understand correctly, Mr. Steinberg, you left the Sugarman group about the first of the year and had no part in any further negotiations on behalf or for Sugarman Lumber Company, is that correct?

A. With the ultimate purchasers?

Q. The ultimate purchasers?

A. Yes, I had contact with the ultimate purchas-

(Testimony of William Steinberg.)

ers, but I wasn't acting in any representative capacity or even in an ownership capacity.

Q. You had no part in negotiating any changes in these resale contracts after the first of the year?

A. No, sir, except on Mr. Holm's contract which was made on February 4th.

Q. And all of these so-called resales are resales over a long period of years with payments only as timber is removed?

A. That is correct, over a period of 10 years.

Mr. Olson: I have no further questions, your Honor.

The Court: All right then, step down, please.

Mr. Dudley: If your Honor please, this witness will still [120] be available at a later date.

The Court: What is the situation? When you say a later date, today?

Mr. Dudley: Today, I mean.

The Court: Well, Mr. Steinberg, is it going to be necessary to call him as a further witness?

Mr. Dudley: I am not sure at the present time, but I feel it may be when further witnesses are called. I understand Mr. Holm is here in court and is going to testify, and I may very well like to ask Mr. Steinberg some questions that Mr. Holm is going to testify about.

Mr. McMurchie: Now is the proper time to ask the questions, your Honor.

The Witness: I would like to get back to San Francisco if I can.

The Court: Well, it seems to me if there are

any further questions to ask you ought to ask them now.

Mr. Dudley: Well, I am not able to now, your Honor. I am just anticipating them.

The Court: I don't know what the situation is going to be. I am not going to require Mr. Steinberg to remain around if that is the situation.

As a matter of fact, I am inclined to think that the whole discussion—I don't know how germane it is going to be, but it may go to some part of this action, but what relationship [121] it has to do with this witness I don't know. At any event it is simply up to you, gentlemen. I am not going to hold the witness here.

You had Mr. Wilson on the stand. Do you want to conclude with his testimony?

Mr. McMurchie: If the Court please, Mr. Holm is also here and would like to get back to San Francisco, if I could have permission to call him out of order.

The Court: All right, call Mr. Holm.

FRED HOLM

called for the Petitioner, sworn.

Direct Examination

Q. (By Mr. McMurchie): Your name is Fred Holm, is that correct? A. Yes.

Q. And will you state your address, Mr. Holm?

A. Gualala, California.

Q. And your occupation?

(Testimony of Fred Holm.)

A. Sawmill operator.

Q. You own a sawmill, is that correct, Mr. Holm? A. I do.

Q. Do you know Mr. Alex Wilson, Mr. Holm?

A. I do.

Q. And can you tell me when you first met Mr. Wilson? A. In May of 1953. [122]

Q. Can you tell me how you first met Mr. Wilson?

A. Mr. Wilson contacted me regarding the sale of some timber adjacent to my mill.

Q. And that was in May of 1953? A. 1953.

Q. And did he discuss that timber with you at that time? A. He did.

Q. And did you conclude that you would purchase that timber? A. I did.

Q. And did you write to Mr. Wilson in that regard? I will show you a letter dated May 27, 1953 on the letterhead of Holm-Solbeck Lumber Company, and ask you if you have seen that letter before? A. Yes; I wrote this letter.

Q. That is your signature, Mr. Holm?

A. It is.

Q. This letter was sent to Mr. Wilson, is that correct? A. It was.

Mr. McMurchie: If the court please, I will introduce this as Plaintiff's Exhibit next in order.

The Court: All right, Petitioner's Exhibit 6.

(The letter referred to was marked Petitioner's Exhibit 6.)

(Testimony of Fred Holm.)

Mr. McMurchie: The letter is dated May 27, 1953, addressed to Mr. Alex Wilson.

"Dear Mr. Wilson: [123]

"I understand you have a pending deal whereby we might acquire a part of the Coastal Timber tract. We are interested in that portion sloping toward the ocean, the timber is located 3 miles from our mill and is a down grade haul. According to the maps it looks like about 16,000,000 feet. Our mile is south and west of the timber, in Gualala.

"My ideas are \$9 with the land and \$8 without. I will buy a larger amount and put in another mill if your principals so desire.

"Very truly yours,

"Fred Holm."

Q. Subsequent to that time, Mr. Holm, subsequent to this letter, were you contacted again by Mr. Wilson? A. By telephone, yes, sir.

Q. Do you recall approximately when that telephone conversation was?

A. Both prior and after the letter.

Q. I see. In other words, you talked with him at various times? A. I did.

Q. And do you know Mr. William Steinberg who has testified here? A. I do.

Q. Will you tell us how you first met Mr. Steinberg?

A. Mr. Wilson called me in connection with the sale of the [124] Coastal Plywood. I called at his office in San Francisco. He referred me to Mr. Steinberg.

(Testimony of Fred Holm.)

Q. Did you discuss these Coastal properties with Mr. Wilson before you went to Mr. Steinberg's office? A. I did.

Q. Was that a lengthy discussion or a short discussion? A. Several discussions.

Q. And you then did go to Mr. Steinberg's office? A. I did.

Q. And you went with Mr. Wilson?

A. I did.

Q. Had you ever met Mr. Steinberg prior to that time? A. I had not.

Q. Do you recall your conversation with Mr. Steinberg at that time in his office?

A. He mentioned the fact that Mr. Wilson had offered him the Coastal Plywood properties and that if I could make a sale of the various units—in our language, so as to cash them out—he could finance the transaction through his connections.

Q. Did he tell you who his connections were?

A. Mr. Nate Sugarman.

Q. Were you able to cash out this transaction, as you say? A. Yes.

Q. How were you able to do that?

A. Through my friends and people in the saw-mill business [125] adjacent to the Coastal properties.

Q. Can you give me their names?

A. Mr.—the Hollow Tree Lumber Company, owned by Mores and Smith, purchased 135,000,000 feet, or Unit No. 1.

The Mullala Forest Products Company, which is

(Testimony of Fred Holm.)

owned by Mr. Laird and Mr. Laitre, purchased 220,000,000 feet. This 220,000,000 feet was purchased by a corporation formed by Mores, Smith, Laird and Laitre, and this group also purchased the mill, the log deck, part of the equipment, the lumber inventory, and so forth.

Q. Can you tell me what the approximate amount of cash out for the resales was?

A. \$7,000,000.

Q. About \$7,000,000 on the resale. Now, who were these contracts made with, who represented the Sugarman Lumber Company?

A. The original contracts were drawn up by myself in conjunction with Mr. Steinberg and Mr. Wilson.

Q. Mr. Wilson worked with you at all times?

A. Yes, sir.

Q. Worked with you during these negotiations for the resale?

A. We discussed the various phases for the sale.

Q. Now, were these contracts with Mr. Steinberg assigned to Sugarman Lumber Company or were more formal contracts eventually executed between yourself and the Sugarman Lumber Company? [126]

A. Final contracts were executed with the original people that I brought into the picture along about the same lines.

Q. Essentially the same lines as the original agreement?

(Testimony of Fred Holm.)

A. Yes. The final consummation was the initial sale.

Q. Essentially the same thing? A. Yes.

Q. Mr. Holm, was a commission ever paid by you to anyone for negotiating these resales?

A. Well, I understood that Mr. Wilson was getting a commission, and my expenses incurred in this transaction plus part of the commission were to be paid to me.

Q. Did you have an understanding as to where Mr. Wilson was looking for his commission?

A. I understood it was coming from the trustee of the Coastal Plywood Corporation.

Mr. Olson: I move to strike that, your Honor, on the ground it calls for a conclusion, an understanding, no basis shown for the understanding.

The Court: Sustained. The motion to strike will be granted.

Q. (By Mr. McMurchie): Mr. Holm, did you ever pay a commission for the negotiating of the resales of the assets of Coastal? A. No.

Q. No commission paid by you to Mr. Wilson?

A. No.

Q. Any commission paid by Hollow Tree Lumber Company to Mr. Wilson? A. No.

Q. Or any other purchaser on the cash out to Mr. Wilson? A. No, sir.

Q. So to your knowledge Mr. Wilson has received nothing for his efforts in this transaction?

A. As far as I know he has not. If he did I didn't share in it.

(Testimony of Fred Holm.)

Q. Have you bought and sold various pieces of timber, Mr. Holm?

A. In connection with my own operations I have, yes.

Q. Can you tell me what the usual brokerage commission is on the sale of timber?

A. 5 per cent.

Q. Can you tell me who pays that commission?

A. The owners.

The Court: You mean the seller?

A. The seller.

Q. (By Mr. McMurchie): Mr. Holm, can you tell me—I think you testified that you purchased from the Sugarman Lumber Company the tract known as Unit No. 2, is that correct?

A. I did.

Q. Can you tell me the approximate number of feet, board [128] feet? A. 152,000,000.

Q. 152,000,000.

A. Yes. 135,000,000 in Unit No. 1, 220,000,000 in Units 3 and 4.

Q. And no commission was paid by you on that purchase? A. No.

Mr. McMurchie: I think that is all.

The Court: All right. How much time will it take you to cross examine this witness?

Mr. Olson: I have several questions, your Honor, but I think, however, it will not take more than 10 minutes.

The Court: If we can dispose of this witness before the noon recess it will be more satisfactory.

(Testimony of Fred Holm.)

The Witness: Thank you.

Mr. McMurchie: We appreciate that, your Honor.

The Court: Will you proceed with the questioning then?

Cross Examination

Q. (By Mr. Olson): Mr. Holm, you were prepared to purchase the timber in Unit 2 for \$9 a foot provided you could also get the land, is that correct?

A. Mr. Olson, in that offer of \$9 was included various other properties other than this 152,000,000 covered. It covered some land at Point Arena, some water bearing property and some various oil lands. The timber itself, my offer was really \$8 [129] including the land, Mr. Olson.

Q. Can you give me the date on which you first met Mr. Steinberg, the approximate date?

A. I think I first met Mr. Steinberg in late June, the first time, June or July, Mr. Olson.

The Court: You mean by that in late June or early July?

A. Yes.

The Court: All right, proceed.

Q. (By Mr. Olson): Following that you succeeded in arranging resales of the timber and mill properties then owned by Coastal to Hollow Tree Lumber Company and various individuals, is that correct? A. I did.

Q. Can you tell me when you first commenced negotiating such resales?

A. Well, there were a number of conferences

(Testimony of Fred Holm.)

with Mr. Wilson and Mr. Steinberg, and I presume it was in early August when I started negotiating with the purchasers.

Q. Early August of 1953? A. Yes.

Q. And you drew the original contracts between Mr. Steinberg and the various purchasers of portions of this property?

A. I did, as to terms and conditions and so forth.

Q. Now, were those contracts between Mr. Steinberg on the one hand and the individual purchasers on the other, namely [130] yourself, Hollow Tree Lumber Company, Mores, Smith and the others you mentioned?

A. I understood—it was my inference he was representing the Sugarman interests.

Q. The contracts were in his name alone as originally executed, is that correct?

A. As originally executed they were in the name of William H. Steinberg, trustee for Sugarman Lumber Company.

Q. And when were these contracts executed?

A. The actual contracts were executed in October.

Q. Of 1953? A. 1953.

Q. And you know that subsequently Sugarman Lumber Company itself negotiated contracts with these various individuals that were actually executed by Sugarman Lumber Company, is that correct? A. That is right.

Q. You were one of the contracting parties with the Sugarman Lumber Company? A. Yes.

(Testimony of Fred Holm.)

Q. And you were the purchaser of one large tract of the timber? A. I was.

Q. And you were still to receive a commission on the resales of the rest of the timber, was that your understanding? [131]

A. No commission other than part of the Wilson commission.

Q. Including a commission on the sale of a portion of the timber to yourself?

A. My commission was based on the fair price that the trustee was to receive for the entire property.

Q. You were to share a commission with Mr. Wilson, is that correct? A. Yes.

Q. What percentage were you to receive?

A. Well, it was more or less understood that the commission was to be divided equally.

Q. Divided equally. Do you still expect to receive that commission? A. Yes.

Q. How much did you pay for Unit 2 of this timber when you bought it from Sugarman Lumber Company?

A. The final price is still pending, Mr. Olson.

Q. Has any agreement at all been reached on the price you are to pay?

A. I am just trying to arrive at an agreement with them now.

Q. I see. But it is a fact, is it not, that you will not pay them a flat cash sum for this timber, but will pay for it as you remove it?

A. That is right, with the down payment. [132]

(Testimony of Fred Holm.)

Q. With the down payment.

The Court: Are you buying the land or the timber?

A. The land and the timber, your Honor.

Q. (By Mr. Olson): Mr. Wilson arranged, negotiated with you at one time, did he not, for the resale of this timber to you at a flat \$9 per thousand including the land?

A. That was a tentative—just a tentative arrangement.

Q. And you knew, did you not, at that time that Sugarman Lumber Company was to receive only \$8 per thousand of that price?

A. No, Sugarman Lumber Company never did know what they were to receive.

Q. Did Mr. Wilson indicate to you that he intended to retain \$1 of that \$9?

A. No, sir.

Q. He did not indicate that?

A. No, sir.

Q. Isn't it a fact, Mr. Holm,—

A. I could tell you how that \$9 comes about if you are interested in it.

Q. Yes, I would like to hear that.

A. That is the price that I sold the other timber for to my customers, to my purchasers.

Q. Oh, you did not retain this Unit 2 yourself?

A. Yes, but in the subsequent conversations—

The Court: He wants to know what you mean by your purchasers. Do you mean the purchasers who bought the other units?

A. That is correct.

Mr. Olson: Do you still own Unit 2?

A. I do.

(Testimony of Fred Holm.)

Q. You do. Mr. Holm, isn't it a fact that the customary commission on the sale of a very large block of timber is well under 5 per cent? Isn't it a fact that normally it goes down to not more than 2 per cent when a large tract of timber is involved?

A. Mr. Olson, in selling a large block of timber there are the usual expenses that do not come under services. It was necessary for me to have a large portion of this recruited and resurveyed and so forth before I could make a sale of the various units.

Q. I don't believe you have answered my question. Do you know of any recent sales in Mendocino County or nearby of very large tracts of timber, in the neighborhood of 500,000,000 board feet?

A. In the State of California, yes, there have been a number of them.

Q. Do you know of any sale of a tract of timber that large or approximately that large which involved a flat 5 per cent commission? [134]

A. I would say that 5 per cent is a fair commission.

The Court: No, he didn't ask you that. He asked you if you knew of any sales of that size, of comparable size, in which 5 per cent commission was paid.

A. If I sold it it would be.

The Court: No, he wants to know if you know of any.

A. I know of a number of timber sales.

Q. Well, do you know what the commission was?

A. 5 per cent.

(Testimony of Fred Holm.)

The Court: And of what size were the sales?

A. The two sales that I am conversant with right now are between two and three hundred million feet.

Q. (By Mr. Olson): Two and three hundred million? A. Yes.

Q. And a commission of 5 per cent has been paid on those?

A. Yes. That is the customary commission.

Q. There have been sales however, have there not, of blocks of timber of two and three hundred million board feet which involved commissions of far less than 5 per cent? A. By negotiation.

Q. Did you ever meet the trustee, Mr. Stevenot?

A. Yes, I met him, had several visits with him, he is a very fine man.

Q. Did you ever mention to him that you were expecting to receive a commission on the Sugarman plan of reorganization? [135]

A. After the negotiations started on the Sugarman transaction I didn't visit with Mr. Stevenot.

Q. You didn't see him?

A. My visits were prior to the start of this sale.

The Court: During any of those times did you ever discuss the possibility of a commission?

A. I never met Mr. Stevenot after I made the sale.

Q. (By the Court): No, before the sale?

A. Before the sale, no.

The Court: You never met him before then either?

(Testimony of Fred Holm.)

A. I met him prior to the sale, yes.

Q. (By the Court): Well, during those times did you ever have any discussions with him about a commission?

A. I did not.

Q. (By Mr. Olson): One final question, Mr. Holm, did you have anything to do with the negotiations of the final contracts between Sugarman Lumber Company and the Hollow Tree Lumber Company, Mr. Mores, Mr. Smith and the other individuals you mentioned?

A. I was in on all the contracts prior to Mr. Rudolph's entrance into the transaction.

Q. And after that you had no part in subsequent negotiations or subsequent changes?

A. I did not.

The Court: Do you have any questions you desire to ask? [136]

Mr. Dudley: Yes, your Honor.

The Court: All right.

Cross Examination

Q. (By Mr. Dudley): Mr. Holm, do you recall inviting the Board of Directors of Coastal Plywood and Timber Company and myself down to the Santa Rosa Hotel, along with yourself and Mr. Steinberg for a dinner and meeting?

A. I did.

Q. And do you recall when that was?

A. That was prior to the final consummation of the sale.

Q. And the consummation of the sale was March 16, 1954?

A. I thought it was late April.

(Testimony of Fred Holm.)

Q. And do you recall at that time telling the Directors that you were not bound by any contract and that you would be glad to negotiate a sale with them, that you had to have that timber, desperately needed it at any price, and if they would give you a sale at a better price you certainly would take it?

A. I think that our entire visit and conversation was based upon the fact that the so-called Sugarman deal was rejected by the Court.

Q. And the contract that you had entered into expired on the 12th of March, is that correct?

A. The agreement that I had never did expire.

Q. Well, you were free of them, you could have been free of them? A. No.

Q. Before the confirmation? Didn't you tell the directors that you would be glad to negotiate a better price with them for the sale of that property?

A. If the Sugarman deal was not approved by the Court I would have sold it for the directors—or for the Trustee.

Q. And you told them also that you had to have that block of timber at any price no matter what it cost you, is that right?

A. I beg your pardon?

Q. You told them that you had to have that block of timber, Unit 2, you were desperately in need of timber, and you had to have it at any price?

A. Well, I don't recall a statement of that type. I am always in the market for timber.

Q. Have you resold any of that timber in Unit 2 that you bought?

(Testimony of Fred Holm.)

A. No, I am using it for my mill. [138]

Q. Now, when did you first go in the lumber business? A. I beg your pardon?

The Court: He said, "When did you first go in the lumber business?"

A. 1937.

Q. (By Mr. Dudley): Weren't you in the used car business at that time?

A. No, sir, I never have been in the used car business.

Q. You were in the lumber business in Washington at that time?

A. No, I was in the manufactured feed business and in the automobile finance business.

Q. The automobile finance business?

A. Yes.

Q. And when did you first go into business down here at Gualala?

A. I first came to Gualala in '47 looking for timber. I built a mill there in '49.

Q. In '49. You have been in the lumber business since 1949 there, is that correct?

A. No, in the lumber business since '37 in Oregon.

Q. I am talking about Gualala.

A. Gualala since '49.

Q. Since '49? A. Yes.

Q. Now who were these tracts of timber that you mentioned of [139] two and three hundred thousand feet that they got 5 per cent interest or real estate commissions on?

(Testimony of Fred Holm.)

A. The Evans tract.

Q. The Evans tract? A. Yes.

Q. Where is the Evans tract located?

A. Just south of the Coastal tract.

Q. Who made that sale?

A. The sale was made by the Cobb-Mitchell Company.

Q. Who? A. C-o-b-b M-i-t-c-h-e-l-l.

Q. Cobb-Mitchell Company, and where are they located? A. They are Oregon operators.

Q. Are they real estate commissioners?

A. I presume they are.

Q. Licensed to operate in California?

A. I presume that they have.

Q. And you know of your knowledge that they got 5 per cent commission on that sale?

A. I understand that was the commission.

Q. You understand. Where did you get your understanding?

A. In conversation with timber men and lumber men.

Q. Do you know who the timber men and lumber men were who told you that?

A. Just the friends that I have and know. [140]

Q. You don't know specifically though where you got the information that they got 5 per cent on the sale of that timber, is that it?

A. I just heard they received that commission.

Q. You mentioned another tract that you know about where they got 5 per cent. What tract was that?

(Testimony of Fred Holm.)

A. That is a number of smaller tracts that were sold by Herbert Cochrane of Ukiah.

Q. You mentioned larger tracts, two or three hundred thousand, two of them, I thought you said, is that correct?

A. That is the Evans tract I have in mind.

Q. That is the one occasion? A. Yes.

Q. And your information there, you don't know where you got it from, do you?

A. I beg your pardon?

Q. Your information on the sale of that tract that the real estate commissioner got 5 per cent, you don't know how you acquired that information, is that correct?

A. That is the general information, yes.

Q. All right. Do you know of any other sales of large timber tracts where a real estate commission was paid of 5 per cent?

A. In Oregon and Washington, hundreds of them.

Q. No, I am talking about California, I am sorry. Any of them in California? [141]

A. Well, I understand that that is the general commission that is paid on all tracts.

Q. Are you a licensed real estate commissioner?

A. I am not licensed to operate, I am a sawmill operator.

Q. But you don't have any license to sell real estate? A. No, I have no license.

Q. Have you ever sold real estate before on a deal like this where you got 5 per cent commission?

(Testimony of Fred Holm.)

A. I am not a licensed real estate broker. I sell my own property.

Q. This is the first time you have ever been involved in real estate where you were to get a commission in selling it?

A. I have been on a number of joint ventures.

Q. Have you ever been in a deal like this where you were to get a part of a 5 per cent commission for the sale of the real estate, timber properties?

A. Would you restate your question?

Q. Have you ever been in any other transaction like you testified to you were here where you got a percentage, you got 50 per cent of the real estate commission for the sale of timber, timber lands?

A. I have been in a number of transactions that I financed where I shared in the profits and so forth to the extent of 50 per cent, yes.

Q. All right, now, do you recall a meeting in the office of [142] the attorney, Mr. Berlin, I believe it is on Montgomery Street in San Francisco, on the day when the petition by a group of stockholders was being heard in this court in San Francisco, and you were present with myself and Mr. Berlin, Mr. Steinberg, Mr. Bost? Do you recall that meeting?

A. I was asked to attend that meeting.

Q. And who asked you to attend that meeting?

A. I think it was Mr. Steinberg.

Q. Mr. Steinberg was your attorney at the time, was he?

A. No, Mr. Steinberg didn't ask me in the capacity of my attorney, and there never has been a time

(Testimony of Fred Holm.)

when it was my wish or desire to upset the sale of the Coastal Plywood tract. I wasn't going to sell it and then go to Court and have it upset.

Q. And the reason for that is because you had to have the timber, your block of timber, at any price, at any cost, had to be sure you got that, is that correct? A. I wouldn't say that.

Q. You did state that, though, at that meeting, didn't you?

A. I am rather of the impression that you are re-quoting my statement.

Q. Approximately that, anyhow?

A. No. I never have to have any piece of timber.

Q. At that meeting did you show up with maps and facts and figures regarding the whole timber tract of Coastal Plywood & Timber Company and discuss with people there the various [143] numbers of board feet and the cost for the various tracts, how much you would be willing to pay for this Unit 2?

A. And those very maps were supplied me by Mr. Wilson.

Q. Yes, and you showed up with those maps there and you told them that you would go to court and testify regarding a plan proposed to be submitted by Mr. Berlin for the purchase, and you would testify that you would buy Unit 2 from him, is that correct?

A. That is a complete fabrication. I never made a statement of that type in my life.

Q. Didn't you tell Mr. Berlin that you would

(Testimony of Fred Holm.)

purchase Unit 2, and that you would go to court and testify to what you would pay for that unit to him?

A. I always have said that if the Sugarman sale was upset that I would buy Unit 2 from whomever purchased it.

Q. Now, if you bought Unit 2 from Mr. Berlin or someone else who submitted the plan were you still going to get a 5 per cent real estate commission, or 50 per cent of the 5 per cent real estate commission?

A. If it would have been the same deal I would have.

Q. What do you mean by the same deal, the Sugarman deal?

A. If it carried through on the original proposition as I started out to sell the Coastal properties I would have.

Q. Was that same deal the Sugarman deal or or——

A. Same deal as the Sugarman deal, yes.

Q. But if you had purchased it from Mr. Berlin under the [144] plan that he was submitting, then would you have gotten the 5 per cent commission?

A. That is only practical, my dear man. Mr. Berlin had nothing to sell.

Q. But you were there with Mr. Berlin assisting him in arranging another plan for the sale of the Coastal properties?

A. I never was there for that purpose.

Q. What purpose were you there for?

(Testimony of Fred Holm.)

A. I was there to protect my purchase of Unit No. 2 I was just an on-looker to see what was going on. I had been informed that the sale was to be upset legally. I was just a good listener and on-looker.

Mr. Dudley: I have no further questions, your Honor.

The Court: Any further questions?

Mr. McMurchie: No questions.

Mr. Olson: I would just like to ask two questions: If I understand you correctly, you are not a licensed real estate broker?

A. I am not; I am a sawmill operator.

Q. And you are also not a licensed business opportunity broker? A. I am not.

Q. But you expect to share in 50 per cent of whatever commission Mr. Wilson might recover?

A. It is a tentative understanding, yes. [145]

Mr. Olson: All right, no further questions, your Honor.

The Court: All right, you may step down.

The Witness: Thank you.

The Court: All right. Now, how much more testimony do you have, Mr. McMurchie?

Mr. McMurchie: I have only Mr. Wilson, your Honor, and I think I may call Mr. Stevenot under 2055.

The Court: You mean under 43-B?

Mr. McMurchie: Whatever it is, yes.

The Court: How much testimony will the Trustee have?

Mr. Olson: We anticipate calling only the Trustee, your Honor.

The Court: Then we should be able to conclude this afternoon.

Mr. McMurchie: We should be.

The Court: If that is the situation, it is now almost 12:30, we will recess until 2:00 o'clock, and then we will go forward and conclude the evidence.

(Thereupon an adjournment was taken until 2:00 o'clock p.m. of the same day.) [146]

Afternoon Session, Tuesday, July 6, 1954, 2:00 p.m.

The Court: Do you desire to call Mr. Wilson to the stand?

Mr. McMurchie: All right, step forward, Mr. Wilson. You have already been sworn.

ALEX E. WILSON

the Petitioner, a witness in his own behalf, resumed the witness stand:

Direct Examination—(Resumed)

Q. (By Mr. McMurchie): Mr. Wilson, I think the last time you were on the stand we had been discussing the sale of the Rickard, Brush and Remmell contracts to Mr. Clarence Nielson, is that correct? A. That is true.

Q. And your testimony was that the sale had been completed to Mr. Nielson for the \$100,000 purchase price and that sale had been confirmed by the Court and you had been paid a \$5,000.00 commission by Coastal Plywood & Timber Company, the debtor corporation? A. That is true.

(Testimony of Alex E. Wilson.)

Q. Now you have indicated some desire to correct your testimony with regard to the delivery of that \$5000 check from the Coastal Plywood & Timber Company?

A. Yes, sir.

Q. Will you correct your testimony? [147]

A. At the last session of the Court I testified Mr. Stevenot handed me that check in his office. That is not substantially correct. Here is what really happened, on second thought; After the deal was closed I went up to Mr. Stevenot's office the next day or the day after expecting to get my check. When I walked into Mr. Stevenot's office Mr. Martin Dyke was in the office. Martin Dyke was the Manager of the Coastal Plywood mill at Cloverdale. The check I had in mind was this: Mr. Stevenot took from his office the \$100,000 Nielson check, he handed that check to Mr. Dyke, and Mr. Dyke turned to me and handed it to me and looked at me and said, "Wilson, that was a very good deal."

I said "Yes, Mr. Dyke," and handed it back to Mr. Dyke.

I stood there a few minutes, and Mr. Stevenot said, "Mr. Wilson, you will receive your \$5000 commission check in the mail in a day or so from Coastal."

And in a day or so I did receive it in the mail.

I had made that error.

Q. And the stub of the check is what has been introduced as the Petitioner's Exhibit No. 2, isn't that correct?

A. Yes.

(Testimony of Alex E. Wilson.)

Q. And that stub states "Commission, sale of cutting contracts, \$5000"?

A. Coastal Plywood, yes.

Q. Now, had you had any discussion with Mr. Stevenot prior [148] to the completion of the sale of these contracts to Mr. Nielson in regard to your commission?

A. I had many discussions with Mr. Stevenot about my commission during all the time I worked on the cutting contracts. Mr. Stevenot kept telling me, time after time, "I don't want to pay you, you must get your commission from the buyer."

I would retaliate saying, "Yes, Mr. Stevenot, if possible, but you can't get any commission from the buyer."

That was mentioned many times, that is a very difficult thing to do, because brokers look with great disdain on that sort of procedure, because there is too much chance of fraud.

For example, Mr. X wants to sell his timber for a million dollars. I represent the seller. If the buyer is going to pay me, some unscrupulous broker can easily say, "Well, Mr. X is in bad financial straits, give me \$700,000, we will make him take it." You have a divided—you are serving two masters. You can't do that in brokerage, and that is why brokers always look to the seller, because they are the men they are representing, and they are the people they are confidential with.

Q. They represent the seller, and they expect to be paid by the seller?

(Testimony of Alex E. Wilson.)

A. They represent the seller and they expect to be paid by the seller, and they expect to get for the seller the largest [149] possible price.

Q. Now, prior to this sale to Mr. Nielson, Mr. Wilson had authorization from the Court ever been obtained for you to proceed as a real estate broker?

A. No, sir, I never knew an authorization was necessary.

Q. You did not know of your knowledge that there was such a thing as an authorization in a re-organization proceeding? A. No, sir.

Q. But you did, in spite of those two facts, receive your commission from the Coastal Plywood & Timber Company? A. I did, sir.

Q. And that was a \$5000 commission on a \$100,000 sale? A. That is correct.

Q. And that would be 5 per cent of the total purchase price? A. That is so.

Q. Now, Mr. Wilson, were there any other assets of Coastal Plywood & Timber Company which you were asked to sell for the Trustee?

A. Yes, there were. I don't know how they were set up on the books, but I think about \$2,000,000.

Q. Can you tell me what these assets were?

A. Those assets of personal property were the mill at Cloverdale, which had been appraised by the American Appraisal Company, Mr. Stevenot gave me that, for \$1,750,000; there was the log deck, there was the lumber in [150] the yard and the rolling stock. I believe they have that on their books at \$2,000,000.

(Testimony of Alex E. Wilson.)

Q. There was also timber in the balance of these assets, was there not, the Garcia tract was included in the balance of these assets?

A. Oh, yes, the balance, but that wasn't the personal property, that was real estate.

Q. Well, I am speaking now of all of the balance of the assets.

A. Oh, yes, what I have named, the personal property, plus 585,000,000 feet of timber, plus 36,000 acres of land.

Q. When were you first asked to sell these assets of Coastal Plywood & Timber Company? Tell me first where the conversation was, and who was present?

A. It was in July, 1952. I had gone to Mr. Carr's office. Mr. Carr, of course, was attorney for the Trustee and he was attorney for the Court, Judge Lemmon at that time presiding. I had sold lots of timber and Mr. Carr knew it, and he asked me to go down to Mr. Stevenot's office in the Bank of America Building, main branch, in San Francisco, to see Mr. Stevenot.

I introduced myself and talked to Mr. Stevenot about selling the Coastal properties.

Q. Did you go to Mr. Stevenot's office?

A. I did. I went to Mr. Stevenot's office, talked to him about it. He said he was delighted that I came down, had many [151] brokers trying to sell the properties, but they had not succeeded.

He said that the first that he wanted to sell was the Brush, Remmell and the Rickard contracts. He

(Testimony of Alex E. Wilson.)

wanted to do that for two reasons, he told me. No. 1, they had bought quite a lot of machinery and had no money to pay for it, and they wanted to pay for that additional machinery. No. 2, there was a clause in the contract where all the timber had to be taken off those properties by 1956.

There was another bad clause that said that all the land must be cleared. It didn't follow the usual timber contract where it says according to State and Federal laws.

The owners were angry about that, and were trying to cancel the contracts.

Another very bad situation was Mr. Swisher, who had sold the "Y" Ranch to Mr. Nielson reserved the roads and the rights of way, and that "Y" road which Mr. Swisher kept control of in his contract with Nielson had to be obtained to get the Rickard timber out.

So all in all they were contracts under which Coastal couldn't operate and as I found out later nobody could operate under.

Q. These are the contracts now that you are discussing that you sold to Mr. Nielson?

A. That is true, sir. [152]

Q. Was there any conversation at that time in regard to the sale of the balance of the assets?

A. Yes. Mr. Stevenot then told me, immediately, he told me right then, he said, "Now, we want to sell all the rest of the assets also because the property is not making any money, the RFC is threatening to foreclose, and personally I am tired of this, I

(Testimony of Alex E. Wilson.)

have other business to do, and I want to get out of this, but you sell to Nielson first, and if you are successful in so doing then I want you to continue and sell the remainder of the assets also."

Q. Did you have subsequent conversations with Mr. Stevenot in regard to the sale of the balance of these assets of Coastal?

A. Many, many conversations.

Q. And when did you start—well, let me ask you this:

During these conversations what requirements did Mr. Stevenot make in regard to the sale of these assets, if any?

A. I suggested to Mr. Stevenot that it might be very fine and that I thought I could make a lot of money for the stockholders if he would let me sell them piecemeal. There was a lot of timber to sell in one block. But Mr. Stevenot told me that he didn't want to do that, he said we must sell all the property in one package, because I do not want to go before the court and ask for permission to sell 50,000,000 feet and 100,000,000 feet. I just don't want to do that, I want to sell the whole thing in one package. [153]

Q. Were there any other requirements that Mr. Stevenot made in regard to the sale?

A. Oh, he made a number of requirements. A particular one was he said, "Now, Alec, the Bank of America has a million dollar mortgage, the RFC has a million dollar mortgage, there is a lot of interest due, the company is behind in interest, I have

(Testimony of Alex E. Wilson.)

large fees to pay in the trusteeship," he has 50,000 coming, and he said, "There is \$80,000 to go to the lawyers, and whoever buys this must be a buyer with sufficient money to pay these obligations, and if they wish to carry the mortgages in the sum of two million they must have, of course, a background so that the RFC and the bank will accept them."

Q. In other words, he required that you either produce a purchaser with cash sufficient to wipe out his secured creditors—— A. Oh, definitely.

Q. ——or with a financial background that was substantial enough that they could take over and re-finance these secured creditors?

A. That is true. And then I had conferences with Mr. Carr just as much as I did with Mr. Stevenot, and Mr. Carr told me at all times—I knew him well, he had been my attorney and my friend for a quarter of a century. He said, "Alex, there is one thing I want you to keep continually in mind, and that is as far as I am concerned I want these stockholders to be paid off dollar for dollar, and I don't want you to bring a deal in here under which the stockholders will not be paid." [154]

Q. Mr. Stevenot make any requirement in regard to the total purchase price?

A. Yes, sir. Mr. Stevenot told me time and time again, I would say, "Well, how much money, Mr. Stevenot, must I bring in, or what must I ask my buyer for?"

Mr. Stevenot would very often say, "Well, you bring in a proposition."

(Testimony of Alex E. Wilson.)

I said, "No, I can't do that, I must have a figure." So finally Mr. Stevenot said, "Well, Alec, I will tell you, you bring in an offer of \$4,000,000 with substantial people, and I am quite sure that the Court will approve the deal."

Q. Now, following these conversations with Mr. Stevenot did you proceed in your efforts to sell the balance of these assets of Coastal? A. I did.

Q. Can you tell us some of the people that you contacted, some of the firms that you contacted in an effort to find a purchaser?

A. Yes, I can. This is a partial list (referring to document), I didn't keep a list of everybody——

Mr. McMurchie: Just one moment, Mr. Wilson, I think the attorneys will want to see that.

(The document was handed to Mr. Olson.)

Mr. Olson: If your Honor please, I am going to enter an objection to this line of testimony on the ground it has no relation [155] to the sale to the Sugarman Lumber Company, or the second plan of reorganization, which I understand is the basis of their claim. This is a list of companies which, as I understand it, none of the assets of the debtor were sold to any of these companies, and they had no participation in the second plan of re-organization.

On that basis, your Honor, on the ground that this inquiry is not relevant to the question before the court today, I will object to any question bearing upon contacts with other companies.

Mr. McMurchie: If the Court please, I believe our petition is framed for the reasonable value of

(Testimony of Alex E. Wilson.)

services performed, which were for the benefit of this estate and performed at the request of the trustee. Now if we are going into the reasonable value of services performed, I think it is necessary that the court know what services were performed, what work was done.

The Court: I presume those are copies of letters to business firms and individuals——

Mr. McMurchie: That is correct.

The Court: ——offering to sell the properties.

Mr. McMurchie: Correct, and also letters from them to Mr. Wilson.

The Court: I will overrule the objection. It goes to show the scope of his activities.

A. I started to—— [156]

The Court: I don't want a long narration on each one of these, Mr. McMurchie, I don't consider it that important.

Mr. McMurchie: Yes. Well, can you give the court briefly the names of the more important people that you contacted, and what you did with them?

A. Yes, sir.

The Court: All right.

A. I will go through them rapidly.

I started to work on the remainder of the assets in October of 1953. I first went to Martell, which is up near Jackson, to see the Winton Lumber Company, and asked for the manager, Andy Kearns.

Briefly, he sent a man with me and we spent a

(Testimony of Alex E. Wilson.)

day and a half looking over the timber of the Garcia.

I next went to see John Hunter of the Twin Cities Lumber Company of Los Angeles. I sold him timber before. He is a man who made a lot of money in the timber business.

I took maps down to him, reports, et cetera. He studied it for a week or so and then turned the property down.

I then contacted Rex Black, President of the Georgia-Pacific Plywood Company. Its Oregon office is at Portland.

The same thing, maps, reports, et cetera. Finally turned the property down.

A. S. Murphy, President of Pacific Lumber in San Francisco. After giving him maps, reports and so forth he turned the property [157] down and stated he would not pay over \$5 a thousand for any timber in the district. I so told Mr. Stevenot about that, because that was shocking to me.

Q. Where did you obtain these maps, Mr. Wilson?

A. I had these maps made by Hammon, Jensen and Wallen of Oakland, the people who made the cruise for Coastal Plywood Company.

Q. At your own expense?

A. Yes sir, at my own expense.

I went to Sid Topol of the Dover Lumber Company of Marysville.

The same procedure. I will just say the same pro-

(Testimony of Alex E. Wilson.)

cedure. That calls for maps, explanations, letters and so forth.

I also contacted Armon Speckert, President of the Speckert Lumber Company of Marysville.

Castille Lumber Company at Willits.

Welsh Brothers, Willits, California.

Orem Lumber Company of Newport, Oregon.

John Bate, of the Bate Lumber Company, of Portland.

J. E. Duffy, Vice-President of the Diamond Match Company of New York, Vice-President and Manager.

Q. Mr. Wilson, are these personal contacts now, or are you referring to letters?

A. Some were personal and some were by letter. Shall I—

Q. I think you better indicate which is which.

A. Well, Andrew Kearns was personal.

John Hunter was personal.

Rex Black is letter.

Sid Topol is personal.

Armon Speckert is personal.

Castille Lumber Company is personal.

Welsh Brothers is personal. All trips by me to see these people.

Orem Lumber Company of Newport, Oregon, that is by correspondence.

John Bate, Bate Lumber Company, Portland, that is by letter.

J. E. Duffy, Vice-President and General Manager

(Testimony of Alex E. Wilson.)

of Diamond Match Company of New York City, that is by letter.

When I say letter, I sent him maps, I sent reports, I sent full information of the company.

Pickens Brothers Logging Company of Silverton, Oregon. Letters again and maps.

Alexander Lumber Company of Gold Beach, Oregon. I went to Gold Beach to see them.

G. R. Van Fleet, of Cannon Beach, Oregon. I not only went up to Cannon Beach and got Mr. Van Fleet and brought him down to Coastal and we spent four days. We stayed in Ukiah at the Palace Hotel, and rode over there every day. He finally turned it down. [159]

Chauncey T. Pettibone, Springfield Mills, Springfield, Oregon. That is maps and letters.

Ralph Smith of the Smith Lumber Company, Cottonwood, California. I went to Cottonwood and saw Ralph Smith and told him all about this thing, and he finally turned it down. He looked like a good prospect, for a while.

Patten-Blynn Lumber Company of Los Angeles. I went personally to see George Patten, I used to work for Patten-Blynn Lumber Company. I went down to see George Patten about it.

Garrabrant Lumber and Investment Company of Willamina, Oregon. That was by letter and maps.

R. C. Miller Logging Company of Arcata, California. That is maps, letters, et cetera.

Thomas Huddleson of Hubbard, Oregon. That again is by letter and maps.

(Testimony of Alex E. Wilson.)

Jude White, President of Long Bell Lumber Company of Longview, Washington. Maps, reports, letters, et cetera, and after each one of these they turned the property down.

Burney Lumber Company of Marysville. That is personal.

Dant & Russell of Portland, Oregon. I went to Portland to see Bob Dant. He is a very good friend of mine. I beg him to take this property and I told him I could make him at least \$2,000,000, and he refused to take it. I have sold lots of property to Dant & Russell.

Eugene Brewer, the General Manager of the U. S. Plywood [160] Company in Cottonwood. I went three times to see George Brewer—Eugene Brewer at Cottonwood. He sent three men, one of his foresters, and they spent five days on the property. Mr. Brewer then flew to his eastern headquarters. I kept in touch with him for a week, and while back there he phoned me and said they turned the property down.

Earl Birmingham, President of the Hammond Lumber Company, San Francisco.

High Sierra Pine Mills, of Oroville, California. I took the matter up with Lou Ohlsen. He sent his cruiser over with me and spent three days on the property, Dave Rogers, the forester.

Feather River Pine Mills of Feather Falls. I went two days on the property with Carl Walker, General Manager of the Feather River Pine Mills.

Bercut-Richards Cannery, they operate the Grays

(Testimony of Alex E. Wilson.)

Flat Lumber Mill in eastern Yuba County. I sold them all of their timber. I gave them maps, reports, letters, and so forth.

Paradise Lumber Company, Bernard Richter, of Oroville. Bernard Richter and I spent three days on this property. I went over to Oroville, got Mr. Richter and took him to the property.

Crofoot Lumber Company of Ukiah. Those are by maps, letters, and so forth. I did not take them to the property.

Lincoln Lumber Company of Oakland. They operate three [161] mills in Butte County. Their Forester is Robert Kitchen. I took Bob Kitchen over that property. We stayed for three days looking it over.

Ken Metzker of Metzker Lumber Company of Reno, Nevada. Maps, letters, et cetera. Those are some of the most important. Attached hereto are all their replies to me, of why they didn't want the property, their criticisms of the property. These are their replies to me. (Indicating documents.)

Q. And copies of your letters to them?

A. And copies of my letters to them.

Mr. McMurchie: I offer these as Plaintiff's Exhibit next in order, your Honor.

The Court: They will be admitted in evidence as Petitioner's Exhibit No. 7, all in one group.

Mr. Olson: May we have the same objection, your Honor?

The Court: Yes, you may, and it will be overruled.

(Testimony of Alex E. Wilson.)

(The documents referred to were marked Petitioner's Exhibit No. 7.)

Q. (By Mr. McMurchie): Now, Mr. Wilson, your testimony here has involved considerable traveling, has it not? A. Yes, sir.

Q. And that traveling was all at your own expense? A. All at my own expense, yes, sir.

Q. Were you reimbursed by anybody for that traveling? A. By no one. [162]

Q. Who paid your expenses during all of this traveling?

A. I paid all of my expenses for the 11 months I put in on this deal and 90 per cent of my entire time for 11 months was devoted to the sale of the Garcia Tract and the Coastal Properties.

Q. Do brokers do any entertainment of clients when he has them out on a survey like this?

A. With timbermen you do terrific entertaining.

Q. I presume that also is at your own expense?

A. All at my own expense, yes sir.

Q. Do you have any estimate, Mr. Wilson, as to the expenses which you incurred during this 11 months period?

A. In my traveling on all deals of this kind I appropriate \$50 a day for expenses, which would make \$15,000, and other obligations I had, I estimate \$20,000, with my time and expenses during the 11 months.

Q. Now during the period that you were doing all of this work, Mr. Wilson, did you keep in contact with Mr. Stevenot, the trustee?

(Testimony of Alex E. Wilson.)

A. I was in Mr. Stevenot's office two or three times a week when I was in San Francisco, I wrote him reports when I was there and when I was away from San Francisco, and kept him informed of every move I was making at all times.

Q. Did you obtain any information from him during this time?

A. All the information I received in connection with the company [163] was received from him, the maps, the cruises, the company reports, inventories of the mill and everything came from Mr. Stevenot.

Q. You contacted him personally at his office?

A. Many, many, many times.

Q. Call him on the telephone?

A. Many times.

Q. Wrote him letters?

A. Wrote him letters, yes sir.

Q. I hand you here a letter, Mr. Wilson, which is on the letterhead of Alex E. Wilson, which purports to bear your signature. Did you write that letter? A. I did.

Q. And did you mail that to him?

A. I did.

Q. It has been produced from Mr. Stevenot's file, is that correct? A. Yes, sir.

Mr. McMurchie: I offer this as Plaintiff's next in order, your Honor.

The Court: Any objection?

Mr. Olson: No objection except the same objection I made before.

(Testimony of Alex E. Wilson.)

The Court: It will be Petitioner's Exhibit 8. Your objection is overruled. [164]

(The document referred to was marked Petitioner's Exhibit No. 8.)

The Court: It is a letter from Wilson to Stevenot?

Mr. McMurchie: That is correct. The letter is dated April 3, 1953.

"I have had two unfortunate experiences.

"First, I tried to sell the Coastal timber to the Hammond Lumber Company. Earl Birmingham, now President of Hammond, is a good friend of mine. He also came from Oroville. He finally turned the deal down.

"Then I started working with Pacific Lumber. Today, much to my disappointment, Mr. Murphy said he did not want the property.

"However, we will not be discouraged.

"Cordially,

"Alex E. Wilson."

He adds a P.S.: "Holm bought the May property, about 18,000,000 feet, not far from his mill. I don't know who sold it. I think he bought it direct. I do not know what he paid."

Q. (By Mr. McMurchie): Mr. Wilson, do you recall anything about that P.S. on that letter?

A. Yes. Mr. Stevenot had heard that Mr. Holm had bought a piece of timber in that neighborhood and asked me who he bought it from, if I knew who he bought it from and what he paid for it, so I reported to him. [165]

(Testimony of Alex E. Wilson.)

Q. This is a reply to that request of Mr. Stevenot?

A. Yes sir, that is in answer to Mr. Stevenot's question.

Q. I hand you now a letter dated April 7, 1953.

A. Yes, that is a letter that I wrote to Mr. Stevenot, yes sir.

Q. That is your signature? A. It is.

The Court: What is the date of the letter?

Mr. McMurchie: It is April 7, 1953.

I offer this as next in order, your Honor.

The Court: It will be received as Petitioner's Exhibit No. 9.

Mr. McMurchie: If I may read that, your Honor.

The Court: You may.

Mr. McMurchie: The letter reads:

"I have the following rather encouraging report to make to you. The Welsh Brothers, Elwood and Jeff, of Willits, are fine prospects for the Coastal timber and mill. I first met these gentlemen about 18 years ago when I was gold dredging in Oregon. They had a large stand of ponderosa pine near John Day. A few years ago they sold the tract for, I am told, two million. Recently they bought the Charles Howard Ridgewood ranch where the famous Seabiscuit was kept. They bought this for cash. They then bought a large pine tract, 60,000,000 feet, at north San Juan, and sold it at a good profit. In short, [166] they are well financed. They have a

(Testimony of Alex E. Wilson.)

sawmill at Willits and are building another on the old Howard Ranch.

“For some time I have been flirting with them in the hope they would take hold. Yesterday they telephoned me stating they are ready to talk business on the Coastal Timber. I am to telephone them next Sunday for a date the middle of next week. I shall report to you before I go to Ridgewood Ranch and will ask again to borrow your cruise. These fellows would be a natural for the Coastal property.

“The above is good news. So that you will be informed as to what I have been doing I recite the following. I have negotiated with the following, but up to now with no luck:

“A. S. Murphy, Pacific Lumber; Earl Birmingham, Hammond Lumber Company, Winton Lumber Company, Georgia Pacific Plywood Company, Castile Lumber Company, Speckert Lumber Company of Marysville. This man still is interested. He offered \$9 for Nielson Timber and Mr. Nielson turned the offer down. I know he made a mistake. Dover Lumber Company of Marysville. They need timber and are still good prospects. Twin City Lumber Company, Los Angeles. Patten-Blynn Lumber Company, Los Angeles, Feather River Pine Mills.

“The last paragraph merely for your information.

“With kindest regards, I am

“Yours truly,

“Alex E. Wilson.” [167]

Q. (By Mr. McMurchie): Mr. Wilson, I will show you a letter dated June 9, 1953.

(Testimony of Alex E. Wilson.)

A. That is true. I wrote that to Mr. Stevenot on that date.

Mr. McMurchie: I ask that it be introduced as Petitioner's Exhibit next in order.

The Court: Subject to the same objection it will be admitted in evidence.

(The document referred to was marked Petitioner's Exhibit No. 10.)

Mr. McMurchie: Addressed to Mr. Stevenot.

"You had asked me to give you a list of companies or individuals to whom I have tried to sell the Coastal Plywood properties.

"At present I am working with the J. J. Sugarman Company and have great hopes that they are going to submit a proposition to you. They are now planning on coming to San Francisco to conference with you.

"Others to whom I have submitted to Coastal properties are" — and there are a list of 26 firms listed in the letter.

"In some cases I took the prospects to the property. I have in my files the correspondence with the above concerning the deal. In addition I have submitted to deal to several individuals whom I shall not bother to mention herein."

Q. Did you supply this list at the request of Mr. Stevenot?

A. I did, sir. He asked me for it. [168]

Q. Now, I note in this letter of June 9, 1953 mention of J. J. Sugarman Company?

A. That is true.

(Testimony of Alex E. Wilson.)

Q. Those are the clients who eventually purchased this property from Coastal?

A. That is true.

Q. And this is the first time you notified Mr. Stevenot in writing that J. J. Sugarman Company were your clients?

A. I had notified him in person several times, but I included it in that letter in writing for the first time.

Q. This is June 9, 1953? A. That is true.

Q. I will show you a letter of June 21, 1953?

A. Yes. That is to Mr. Stevenot. Yes, that is written by me on that date. That is my signature.

Mr. McMurchie: I offer this as Plaintiff's Exhibit next in order.

The Court: All right, Petitioner's Exhibit 11.

(The document referred to was marked Petitioner's Exhibit No. 11.)

Mr. McMurchie: This is dated June 21, 1953 on the letterhead of Alex E. Wilson, addressed to Mr. Stevenot.

"I went today, per schedule, to the office of Mr. William Steinberg, who has represented that he represents the Sugarman Company of Los Angeles and New York. [169]

"The upshot was that Mr. Sugarman did not arrive. Mr. Steinberg informed me that after studying the deal the Sugarman Company decided they did not want the deal. Quite a surprise to me after such assuring talk.

(Testimony of Alex E. Wilson.)

"However, I immediately talked over the telephone to Mr. Eugene Brewer, President, U. S. Plywood Corporation, Shasta Division. Mr. Brewer, whom I know and who is a very reliable man, states that he is sure his company will be interested. Today he is telephoning to his New York office. I have left for Redding, California to see Mr. Brewer and will be in his office tomorrow.

"Hoping that the above will develop, I remain

"Your truly,

"Alex E. Wilson."

Q. This is a letter of June 21st, Mr. Wilson?

A. That is true.

Q. You recall that Mr. Sugarman did not arrive for the scheduled conference?

A. That is correct.

Q. —some time prior to this letter of June 21st?

A. Yes, sir.

Q. I will show you a letter dated July 17, 1953.

A. To Mr. Stevenot, July 17th. I wrote him the letter, yes sir, and that is my signature.

Mr. McMurchie: I offer that as next in order.

The Court: Petitioner's Exhibit 12.

(The document referred to was marked Petitioner's Exhibit 12.)

Mr. McMurchie: Dated July 17, 1953 from Mr. Wilson to Mr. Stevenot.

"The following will bring you up to date in my attempts to sell the Coastal Plywood properties.

"1. Mr. Gene C. Brewer, President of the United

(Testimony of Alex E. Wilson.)

States Plywood Company, has a crew of men going over the timber holdings. This group is headed by Harry Russell, log production manager for U. S. Plywood. Within a few days Mr. Brewer will write us a letter stating his plans.

“2. The Sugarman Company, represented in this city by Mr. William Steinberg, has again come back into the picture as possible buyers. Today Mr. Steinberg asked me to come to his office. He now states that within a few days he is going to hand me a proposal accompanied by a check.

“3. Within a day or so I will go to Reno where I am to meet Norman Biltz, a very wealthy investor. He is interested in the property and may give me a proposal to hand to you.

“Will keep you informed. I remain yours truly,

“Alex E. Wilson.”

Q. Now this is dated July 17th of 1953, Mr. Wilson? A. Yes, sir.

Q. And it mentions that the Sugarman Company has come back [171] into the picture and hopes to hand you a proposal within a few days?

A. That is true.

Q. And as I recall, the proposal of Sugarman Company which has been introduced as an exhibit—— A. Was July 22nd.

Q. ——was July 22nd, five days later?

A. That is true.

Q. Now, Mr. Wilson, during these negotiations did Mr. Stevenot give you any information as to

(Testimony of Alex E. Wilson.)

the amount of timber that was on that land up there?

A. He did—at first there was not a cruise, but Mr. Stevenot had a cruise made and he gave me a copy of the cruise.

Q. Do you know when that cruise was made?

A. I have forgotten. It should be there, the date is on it.

Q. Was it September of 1952?

A. Yes, it was, made by Hammon, Jensen & Wallen.

Q. You used that cruise in your negotiations with these potential purchasers? A. I did.

Q. And you obtained that cruise from Mr. Stevenot, did you? A. I did.

Q. Let me ask you this: Did you obtain any information with regard to the Coastal properties from anyone other than Mr. Stevenot? [172]

A. No one but Mr. Stevenot.

Q. He gave you all of the information you requested to carry on these negotiations?

A. He was very cooperative, he gave me every assistance in the world.

Q. And you kept in continual contact and association with him?

A. I kept in continual contact with him by word of mouth, by telephone and by letter reports.

Q. No question but what he knew that you were working on the sale of the Coastal assets?

A. Oh, definitely not.

(Testimony of Alex E. Wilson.)

Mr. Olson: If Your Honor please, I object to counsel leading the witness.

The Court: Yes.

Q. (By Mr. McMurchie): Let me ask you this:

Did you ever discuss your work in attempting to find a purchaser for these assets with Mr. Sterling Carr, who was attorney for the trustee?

A. Many times.

Q. Where were those conversations held?

A. In his office in the Crocker Bank Building in San Francisco.

Q. Would you relate those conversations?

A. Yes. I would report to Mr. Stevenot and I would go over to see Mr. Carr, he would tell me Mr. Stevenot thought a lot of [173] me as a salesman and he was sure that I would sell it and it had to be sold, because the RFC wanted their money, that there was a change of administration in the RFC and that interest was due, and if a foreclosure came the stockholders would lose everything, there wasn't a chance for them to get out.

Q. Mr. Carr and Mr. Stevenot encouraged you in every way? A. Encouraged me at all times.

Q. Now, did you and Mr. Stevenot ever discuss during the period of these negotiations the commission that was to be paid to you in the event that you completed a sale of these assets?

A. Many, many times.

Q. Would you relate the conversation in that regard?

(Testimony of Alex E. Wilson.)

A. These conversations would take place in his office, Mr. Stevenot would tell me that he didn't want to pay me and he would say, "Alec, I want you to get your commission from the buyer."

I would retaliate saying, "Mr. Stevenot, you can't do that. In my 33 years as a broker I have never received a commission in my life from a buyer."

Mr. Stevenot would follow the same pattern in the next meeting, always stated he wanted me to get the commission from the buyer.

I asked him one day, I said, "Mr. Stevenot, why do you take that particular position? You know that that is an impossible thing to do."

He said, "Well, I have a lot of fees to pay, I have got my [174] own fee, and the attorney's, and I *just want* to go before the Court and ask for additional fees."

Q. Mr. Wilson, during these discussions did you ever reach a definite understanding with Mr. Stevenot that you would not obtain your commission from Coastal?

A. Never a definite understanding, no, until the 22nd day of July and then I had a definite understanding.

Q. Did you ever have a definite understanding with him that you would obtain your commission from the buyer?

A. No, and I believed that he would pay me, because he followed the same pattern when I sold the Nielson deal, he always told me he wouldn't

(Testimony of Alex E. Wilson.)

pay me, but he did pay me in the final analysis.

I also told Mr. Carr, I would report to Mr. Carr and I would tell him that Mr. Stevenot told me that he wouldn't pay me. Mr. Carr would urge me to continue. He said, "Stevenot is quite a decent fellow, he won't do that in the final analysis. He is not going to cheat you out of your brokerage if you sell it. Stevenot is all right, he is a good businessman and he will pay you."

Q. Did Mr. Stevenot ever tell you not to proceed if you could not get your brokerage from the buyer?

A. No, quite the contrary; he urged me at all times to sell it, to continue to attempt to.

Q. Did Mr. Stevenot ever inform you that it might be best [175] to obtain court authorization for your services?

A. No sir, I didn't know that was necessary.

Q. Did you have any knowledge of your own that authorization was required or might be required?

A. No sir. I am not a lawyer, I am a timber salesman.

Q. You stated that your arrangement for a commission in the Nielson transaction and in this transaction for the sale of the balance of the assets were exactly the same, is that right?

A. The same pattern exactly.

Q. Did you have any prior authorization from the court in the Nielson matter?

A. No, sir.

(Testimony of Alex E. Wilson.)

Q. Any reason to believe that the sale of the balance of these assets would be any different than the sale of the contracts to Nielson?

A. No, sir.

Q. Mr. Stevenot cooperated with you in both transactions, is that correct?

A. A hundred per cent, 100 per cent at all times.

Q. Exactly the same, except that you weren't paid on the last transaction?

A. That is correct.

Q. Now, did you eventually find a purchaser for the balance of the assets of Coastal?

A. I did. [176]

Q. What was the name of that purchaser?

A. The Sugarman Lumber Company.

Q. Will you tell me when you first contacted the Sugarman Lumber Company?

A. I had taken a trip to Redding to try to get the U. S. Plywood Company to come back into the deal. After they had turned it down I thought—by the urging of Mr. Stevenot, because he said he hoped I could sell it to them because they were rich people.

I said I would go up again and try to get Brewer to change his mind.

I couldn't, and I came back to my office at 155 Montgomery Street about 3:00 o'clock in the afternoon. Mr. Redge Kuhen was sitting there. Redge comes into my office very, very often.

(Testimony of Alex E. Wilson.)

And I said, "Well, I have failed again on this Coastal deal."

He said, "Well, I know a man who will buy it."

I said, "Do you?"

He said, "Yes, there is a lawyer over here by the name of William Steinberg. I was talking to him yesterday, and he said he had a very rich client by the name of Sugarman."

He said, "He will buy that property."

I said, "Well, let's go over right now, take me over to Mr. Steinberg's office."

And he took me over to Mr. Steinberg's office on Market [177] Street, Market and Montgomery, and introduced me to Mr. Steinberg.

Q. Can you tell me about when that was, Mr. Wilson?

A. That was—I noted it down here, I think I noted it when I met Steinberg. Met Steinberg April 1953.

Q. April of 1953? A. Yes, sir.

Q. Who was present at the time of this conversation?

A. At this conversation Mr. Redge Kuhen, Mr. Steinberg and I.

Q. Did Mr. Steinberg tell you at that time who he represented?

A. Yes, sir. He said that he represented—not only represented but was an associate also of Mr. Sugarman and Associates of Los Angeles, and that

(Testimony of Alex E. Wilson.)

they were looking for just such a property as I had for sale.

Q. Did he name any of the associates, Mr. Wilson?

A. Yes, he did. He said that Mr. Barney Margolis was one of them and two of the Sugarman and himself, Mr. Steinberg.

Q. Did you discuss the Coastal deal with Mr. Steinberg?

A. I did at great length, and I turned over to Mr. Steinberg on that day many of the documents that I had. I think the cruise, some of the maps, the report of the company, which all of it Mr. Stevenot had given me, and then——

(Mr. McMurchie handed a document to Mr. Olson.)

The Court: How much longer do you think you will have on direct examination of this witness?

Mr. McMurchie: I would say about 15 or 20 minutes, Your [178] Honor.

The Court: Well, hurry it along.

Mr. McMurchie: I will show you, Mr. Wilson, a letter addressed to Mr. William Steinberg. Is that your handwriting?

A. That is my signature, and I did send that to Mr. Steinberg.

Q. And that is a list of things that you handed to Mr. Steinberg, is that right?

A. That is a list given to me by Mr. Stevenot.

(Testimony of Alex E. Wilson.)

Mr. McMurchie: I will introduce this to show the documents turned over to Mr. Steinberg.

The Court: All right, it will be admitted in evidence as Petitioner's Exhibit 13.

(The document referred to was marked Petitioner's Exhibit No. 13.)

Mr. Olson: What is the date of that letter?

Mr. McMurchie: Oh, I am sorry, a letter dated May 29, 1953, on the letterhead of Mr. Alex E. Wilson, addressed to Mr. William Steinberg.

"In connection with the possible purchase of Coastal Plywood by your client, J. J. Sugarman, I am sending you the following data:

"1. Detailed inventory, given to you a few days ago.

"2. Letter from Speckert Lumber Company stating that they will take the sugar pine logs from Coastal properties at [179] \$60 per thousand covered in their pond at Marysville.

"3. Letter from Holm-Solbeck Lumber Company stating that that company will purchase for \$8 fir, and \$8 for redwood, but for \$9 in each case if land goes also.

"4. Financial report of Holm-Solbeck Lumber Company which must be returned to that company by June 5 next.

"5. Totals of cruise for Coastal Plywood timbers showing five hundred fifty"—

The Witness: Million.

(Testimony of Alex E. Wilson.)

Mr. McMurchie: Million, yes—"board feet on 35,000 acres of land.

"6. Coastal report of trustee for quarter ending March 31, 1953.

"7. Property map of Coastal Plywood Company showing location of timber.

"It is our understanding that you are to send this data to the J. J. Sugarman Company for their study over Saturday and Sunday and that then Monday or Tuesday Mr. Sugarman is to come to San Francisco where we will attempt to purchase for him the properties of the Coastal Plywood Company."

Q. All of this information then was given to Mr. Steinberg, is that correct? A. Yes, sir.

Q. So far as you know it was digested by him and forwarded to his client? [180]

A. That is true.

Q. Now, was there any particular requirement that the Sugarman interests made before they would make an offer to the Sugar Lumber Company?

A. Yes, sir.

Q. What—

A. Mr. Barney Margolis wrote a letter to Mr. Steinberg and Steinberg brought it over to show me, and the letter stated that he, Mr. Sugarman and their associates would purchase the Coastal Plywood Company assets according to all the information I sent to them, but that before they would put

(Testimony of Alex E. Wilson.)

up their money they wanted me to resell all of the assets, before they bought any of them.

Q. And there I believe is Plaintiff's Exhibit 5, the letter from Mr. Margolis to Mr. Steinberg you were referring to? A. Yes, sir.

Q. What did you do in regard to this resale of the assets?

A. I went over to Mr. Steinberg's office, and I had been talking weeks before to Mr. Holm, I knew that he would take 200,000,000 feet and he told me that he knew other men who would also buy portions, and I told Mr. Steinberg, I said, "Yes, I can do that."

And he seemed to be quite pleased with it, and he said, "Well, Alec, if you can do that, why, we have a deal, the Coastal is sold." [181]

I said, "Why, certainly I can do it."

And he said, "Well, who would you sell them to?"

Well, I said——

Mr. Dudley: I am going to object to this as hearsay, your Honor.

The Court: Well, I think the conversation between Steinberg and this witness is hearsay.

Q. (By Mr. McMurchie): Well, I will ask this question: Did you produce to Mr. Steinberg a purchaser for the assets of Coastal?

A. Yes. I brought Mr. Holm into San Francisco. I first took him to my office and equipped him with five or six large maps of all the Coastal holdings that I had bought from Hammon, Jensen & Wallen.

(Testimony of Alex E. Wilson.)

He explained to me what he could do in putting together the deal. He said he could sell to——

Mr. Dudley: This is hearsay, your Honor. I wish to object to that again.

The Court: Yes, again that is hearsay.

Q. (By Mr. McMurchie): Did you take Mr. Holm to see Mr. Steinberg?

A. Yes, I took Mr. Holm to see Mr. Steinberg, and Holm said he would buy 200,000,000 feet, and he said——

Mr. Dudley: Again this is hearsay.

Q. (By Mr. McMurchie): Did they enter into a contract?

A. They entered into a contract, yes, sir.

Q. Was all of the property resold first? [182]

A. All of the property was resold with about a \$2,000,000 profit before any money was put up at all.

Q. Did you work with Mr. Holm and Mr. Steinberg on this resale? A. Day after day.

Q. Do you know who purchased besides Mr. Holm on this resale? A. Yes, sir.

Q. Who were they?

A. The sales were——Holm took 250,000,000 feet, Hollister took 135,000,000 feet, Smith & Mores took 220,000,000 feet and then Hollow Tree and Malala Wood Products and Mr. Laird took the log deck and mill and part of the rolling stock. There was part of the rolling stock not yet sold.

Q. You were representing Coastal—what was

(Testimony of Alex E. Wilson.)

your interest in these resales, let me ask you that?

A. My interest was to aid the stockholders of Coastal to sell the deal. I had a \$200,000 commission coming on the 200,000,000 feet of Holm timber. I get a dollar a thousand for all the timber I sell. I have only received as small as 5 per cent once in my life.

I gave the \$200,000 commission away, I told Mr. Steinberg and I told Mr. Holm that I would sacrifice that so that the biggest price possible would be paid to the stockholders of Coastal, and at the same time the buyers would get as fine a deal as possible.

Q. Then you worked these resales in order to be able to produce a purchaser for the assets of Coastal, is that right?

A. As a broker I would have been entitled to a dollar a thousand commission on the whole 500,500,000 feet if I had not wanted to sacrifice it and make it possible for Mr. Stevenot to terminate this project. He hadn't been able to do it before.

Q. Now, did you have any agreement with Mr. Holm in regard to payment to him of any portion of your commission?

A. I told Mr. Holm that I wanted him to help put the thing together, he was the bell cow, is the word I used, and that I didn't want him to be out any money out of his pocket and I would protect him for his expenses in running around putting the rest of the deal together, with me and Mr. Steinberg's assistance.

(Testimony of Alex E. Wilson.)

Q. Did you ever agree with him to split your commission?

A. No, of course not. That would be illegal for me to do. I have been a broker for 33 years, I couldn't do that, I would lose my license and be fined. If Mr. Holm had a different understanding he is just mistaken about that.

Q. Did you ever reach a fixed figure as to what his expenses had been?

A. Never. I never thought what they might be, I knew they wouldn't be very much, because it didn't take very long to put these deals together.

Q. Was there any reason why the Coastal properties were not [184] sold directly to Mr. Holm and these other purchasers, Hollow Tree Lumber?

A. Yes, there definitely was. Mr. Stevenot didn't ever want to do that. He didn't want to sell anything separately, he wanted to sell the whole thing as a package.

The Court: He has testified to that already. I mean I don't want you to be covering the same ground again. He said that Mr. Stevenot would never agree to sell the property in any part, he always wanted to sell it as a whole.

Mr. McMurchie: Yes.

Q. Following these contracts for the resale of the assets of Coastal did the Sugarman's make an offer to purchase?

A. They first made an offer of \$3,750,000, and I told Mr. Steinberg when the offer came in, I said

(Testimony of Alex E. Wilson.)

“Well, that isn’t enough, we will have to get Sugarman to put up more money, because Mr. Stevenot always wanted four million”——

Mr. Olson: Same objection, your Honor.

The Court: Yes. The part that the Sugarman first made an offer of \$3,750,000 will stand. The rest will go out.

Q. (By Mr. McMurchie): You are referring now, Mr. Wilson, to Petitioner’s Exhibit No. 3, the letter of July 22nd, from Mr. Steinberg to Mr. Stevenot as Trustee for Coastal? A. Yes, sir.

Q. That letter was dated July 22 of 1953, was it not? A. That is true.

Q. And I believe Mr. Steinberg has testified that that [185] letter was delivered to Mr. Stevenot on that day? A. It was.

Q. Now did you receive a letter from Mr. Stevenot also dated July 22, 1953? A. I did.

Q. Is this the letter that you received from Mr. Stevenot? (Exhibiting document to witness.)

A. Yes, I received that on the 22nd day of July.

Mr. McMurchie: Petitioner’s next in order, your Honor.

The Court: All right, it will be admitted in evidence as Petitioner’s Exhibit 14.

(The document referred to was marked Petitioner’s Exhibit No. 14.)

The Court: That letter is annexed as an exhibit to some of the pleadings.

(Testimony of Alex E. Wilson.)

Mr. McMurchie: Yes, that is the one that is annexed to the Trustee's pleadings.

It is dated July 22, 1953.

"Dear Mr. Wilson:

"I wish to thank you for your letter of July 17th advising me of your current efforts to develop a plan of reorganization of Coastal Plywood & Timber Company.

"The plan of reorganization which I have filed with the Court has not yet been passed upon by Judge Lemmon and I will receive and consider any proposals which you may desire [186] to submit on behalf of your clients. Of course, any plan which you may submit should be of the nature contemplated by Chapter X of the Bankruptcy Act. Moreover, as I have previously advised you, neither I nor Coastal Plywood & Timber Company may be obligated for any commissions payable in connection with such a plan, and any such commissions must be paid by the investors for whom you act."

Mr. Wilson had you ever been notified by Mr. Stevenot in writing before that you would not obtain a commission from Coastal?

A. Never. That is when he really notified me, July 22.

Q. That is July 22, 1953? A. Yes, sir.

Q. And your testimony is that the offer of the Sugarman Company was delivered to Mr. Stevenot on the same day?

(Testimony of Alex E. Wilson.)

A. On the same day, and a copy of it delivered to me by Mr. Stevenot.

Mr. Dudley: Pardon me, counsel, did you say "in writing"?

Mr. McMurchie: I did.

Q. Did you talk to Mr. Sterling Carr about this letter?

A. When I received the letter in which Mr. Stevenot said he wouldn't pay me, in writing, I had received a copy of a letter from the Sugarman group that same morning. The Sugarman group also told me that they wouldn't pay me in that letter.

The Sugarman group had also delivered a copy of that same [187] letter to Mr. Stevenot that morning, so on the morning of the 22nd, Mr. Stevenot knew, but he didn't know that I knew, this is the first time he knew that I knew, they notified him on the morning of the 22nd when they put in their offer that they would not pay me.

The same afternoon of the 22nd, Mr. Stevenot wrote me that letter and he told me that he wouldn't pay me.

I was shocked, of course, because Mr. Carr had assured me and reassured me time and time again that Mr. Stevenot was a very decent fellow.

Mr. Dudley: Object to that as hearsay.

The Court: Carr?

Mr. Dudley: Yes.

The Court: The attorney for the Trustee? Are you claiming that a conversation between this wit-

(Testimony of Alex E. Wilson.)

ness and Mr. Carr, the Attorney for the Trustee, is a hearsay conversation?

Mr. Dudley: Yes, your Honor.

Mr. Olson: I think that is correct, your Honor.

Mr. McMurchie: Oh, absolutely not, your Honor.

Mr. Olson: I don't think Mr. Carr had any authority to speak for the Trustee.

The Court: He is representing the Trustee. He is an attorney at law, an agent of the Trustee.

Mr. Dudley: This is a conversation between Mr. Wilson and Mr. Carr.

The Court: Mr. Wilson and Mr. Carr, an agent for the [188] Trustee. Do you claim that is a hearsay conversation?

Mr. Olson: My objection, your Honor, is on the ground that a statement by Mr. Carr could not bind the Trustee.

The Court: That is another matter, but it may be notice to the Trustee through Mr. Carr. I don't say it is binding or anything of the sort, but it certainly has some aspect of notice, in the sense of giving information, and I am not going to rule that a conversation between the Attorney for the Trustee, who has had a long range of dealing in this matter, with this witness as well as Mr. Stevenot, is going to be hearsay in so far as the Trustee is concerned. I will overrule the objection on that basis and permit any conversation of that kind, but between Steinberg and Sugarman and so on, that is all hearsay.

(Testimony of Alex E. Wilson.)

Mr. Olson: I appreciate that.

The Court: I sustain an objection to that.

Q. (By Mr. McMurchie): Will you relate that conversation with Mr. Carr on the afternoon of July 22nd?

A. I took Mr. Stevenot's letter down to Mr. Carr's office and I said "Mr. Carr, I am shocked about this. I have here a letter from Mr. Stevenot, and you told me all the time he was a decent fellow and he would protect me, and you knew that he would, and here is a letter in which he now notifies me in writing that he won't pay me, and he is writing me that letter, he has already had the offer from the Sugarman's to buy," and I said, "I know, because Mr. Steinberg gave me a [189] copy of the letter this morning and he told me he had a copy of the letter from the Sugarman group that very morning in which they said that they wouldn't pay me."

I said, "I can't understand anything like that."

Mr. Carr said "I was never so shocked in all my life, I can't believe it, I can't believe that this is true." He said, "Alec, you go along just exactly the way you are going, don't say anything about it, because if Mr. Stevenot is going to treat you that way after you have raised all this money and sold this property, then the only thing you can do is seek refuge with the court, because, after all, Mr. Stevenot hasn't got any legal right to give you a contract. Mr. Stevenot hasn't any legal right to set

(Testimony of Alex E. Wilson.)

your fee, and you go right along, because you have been honest in this thing and you have worked hard and we needed this money so badly, and when the deal is closed, if he still doesn't pay you and you sue for it you can feel perfectly safe that the Courts of this state will treat you justly."

I said "Thank you very much."

And I have never told Mr. Stevenot until this moment that I knew that he had been notified in writing by Sugarmans that they wouldn't pay me. He went on for several months telling me, "Well, you get it from the buyer," and he knew all the time that he was notified. He was playing foxy with me.

Q. Mr. Wilson, do you feel that on July 22nd you had introduced to the seller, Coastal Plywood, the eventual purchaser of their [190] assets?

A. I brought together the buyer who was willing and able to purchase, and I had completed my transaction.

Q. You feel that on that day, on July 22nd, you had earned your commission?

A. That is all a real estate broker is required to accomplish.

Q. Following this letter of July 22nd to Mr. Stevenot did you have any conversation with Mr. Steinberg in regard to the commission?

A. Yes, on that same day.

Q. (By the Court): Did you have a conversation?
A. I had a conversation, yes, sir.

Q. (By Mr. McMurchie): Did you subsequently

(Testimony of Alex E. Wilson.)

reduce the substance of that conversation to writing? A. I did.

Q. Is that the document which has been introduced into evidence as Petitioner's Exhibit No. 4?

A. That is true.

Q. Did you understand that the \$25,000 specified—it is the letter of the 25th, your Honor, in which Mr. Steinberg agrees to pay Mr. Wilson \$25,000.

The Court: Yes.

Mr. McMurchie: That letter mentions the sum of \$25,000 to be paid to you by Mr. Steinberg. Did you ever have an agreement that that was to be in lieu of your Commission?

A. Of course not, that is only the expense account. The [191] 5 per cent commission on the \$4,500,000 deal is \$233,000.

Q. So that was strictly the expenses that you incurred? A. Yes, sir.

Q. And you estimate that those were the expenses which you had incurred to that date?

A. With my time and my expenses, yes, sir.

Q. Now this transaction was ultimately consummated, I believe, by approval of this Court on March 16th of 1954? A. That is true.

Q. Was that eventual purchase the result of a continuing negotiation between the Sugarmans and yourself?

A. Completely, completely, 100 per cent.

Q. Can you tell me what the established real estate broker's commission is on the sale of timber

(Testimony of Alex E. Wilson.)

lands? A. Timber is considered real estate.

The Court: Growing timber.

The Witness: Pardon me?

The Court: Growing timber.

The Witness: Yes, your Honor. The San Francisco Real Estate Association, which every small and large town in California copies their regulations, it calls for 5 per cent commission.

Q. (By Mr. McMurchie): Mr. Wilson, I show you a book which purports to be the San Francisco year book for the year 1954?

A. That is true, that is the San Francisco Real Estate Year Book for the year 1954. [192]

Q. Does that book list in it the real estate broker's commission established by the San Francisco Real Estate Board? A. Yes, sir.

Q. Does that list in it the percentage of commission payable to a broker upon the sale of real estate outside of the County of San Francisco?

A. Yes, sir.

Q. And what does it state in that respect?

A. 5 per cent.

Q. Can you tell me what the commission is upon the sale of personal property as established by the San Francisco Realty Board?

A. It is 10 per cent on the first \$50,000, and then 5 per cent on all sales over.

Q. Now, Mr. Wilson, can you testify from your own experience of 33 years as a real estate broker what the established commission is?

(Testimony of Alex E. Wilson.)

A. In my 33 years as a broker the commission has always been 5 per cent.

Q. Can you tell me what the total purchase price for all of the assets of Coastal was?

A. Yes, sir. It was \$4,452,275.

The Court: What is the necessity of going into that?

Mr. McMurchie: To establish reasonable compensation, your Honor, 5 per cent of the total purchase price.

The Court: Well, the total purchase price is already in [193] evidence. It is admitted, the record establishes that.

Mr. McMurchie: Yes, that is correct.

The Court: You are claiming a commission on that?

Mr. McMurchie: We are asking for reasonable compensation, which we believe is the established rate of compensation for a real estate broker. Of course, it is in the discretion of the Court. We are only indicating what the established rate is.

The Court: I am just indicating what the evidence is. If you feel it should be developed—it is getting past three o'clock. Are you about through with your direct examination?

Mr. McMurchie: Very close, your Honor. I have only a few more questions.

The Court: Well, conclude. I have another matter on the calendar, there is another case.

Q. (By Mr. McMurchie): Mr. Wilson, is there

(Testimony of Alex E. Wilson.)

any personal property included in the sale of these assets of Coastal?

A. Yes, there was the mill and the log deck and the lumber in the yard and the rolling stock. I think it is on the books for the company for about two million dollars.

Q. About two million dollars of personal property? A. Yes, sir.

Q. Do you feel that your services in this matter have been of benefit to the estate, the stockholders and the creditors? [194]

A. I think they saved the stockholders and all concerned from complete bankruptcy.

Q. And you are asking this Court that you be allowed a reasonable compensation for your services as real estate broker? A. I am, sir.

Mr. McMurchie: I think that is all, your Honor.

The Court: All right. Then in so far as this case is concerned we will take a brief recess. I have some matters that I want to hear, some criminal matters, before the Court will be at recess, so if you will just remain in the court room. You may step down.

(The Court thereupon took up another matter.)

(Recess.)

Mr. McMurchie: You may cross examine.

Cross Examination

Q. (By Mr. Olson): Mr. Wilson, you first met Mr. Stevenot, the Trustee, in July of 1952, is that

(Testimony of Alex E. Wilson.)

correct? A. That is true.

Q. And not August, as alleged in your petition?

A. It was in July, because I found a letter in July which I wrote to him, so I met him in July of 1952.

Q. And you went to Mr. Stevenot's office because you heard he had some timber contracts he was unable to take advantage of, didn't you?

A. No, I went to his office because Mr. Carr told me to go [195] down there and try to sell this Coastal Plywood Company for Mr. Stevenot.

Q. Mr. Carr had told you that Coastal had some timber contracts, timber cutting contracts that it was unable to take advantage of?

A. That is right, for me to go down and see if Mr. Stevenot didn't want me to sell them.

Q. And you then had a purchaser who was interested in buying these cutting contracts, is that right? A. Pardon me, sir.

Q. You had a purchaser who was interested in buying these cutting contracts, did you not?

A. I didn't right then. It took me about three months to find a purchaser for plywood. I didn't have a purchaser when I went down there.

Q. Now at this meeting in July, 1952 when you called upon Mr. Stevenot, the Trustee——

A. Yes.

Q. The Trustee told you that he had been negotiating with the land owners in an attempt to obtain an amendment to those contracts, did he not?

A. I don't recall. Maybe he did.

(Testimony of Alex E. Wilson.)

Q. Didn't he also tell you that he was endeavoring to get the rights of way necessary to take advantage of those contracts?

A. Yes, he told me that, but he wasn't able to do it. [196]

Q. But he was still negotiating, was he not?

A. Yes, he said he was trying to do something about it.

Q. And he told you, did he not, that he had offered the landowners, subject to court approval, to release them from the contracts if they would pay the debtor the sum of \$100,000?

A. Ask that question again, please.

Q. The Trustee told you when you called upon him in July of 1952, did he not, that he had offered to the land owners to release them from the contracts if they would pay the debtor a hundred thousand dollars?

A. No, he never told me that. Of course not.

Q. Where did you obtain the figure of \$100,000?

A. I got the figure from Mr. Stevenot, time and time again, I got it from Mr. Stevenot.

Q. Didn't the Trustee tell you he was negotiating with the Rickards, that is, with the land owners, for the sale or release of the contracts to them?

A. No, he told me at all times that he wanted to sell those contracts, and it was very, very important, and I went on and sold them, after three months work on them.

Q. But he did tell you he was trying to negotiate

(Testimony of Alex E. Wilson.)

changes in the contracts that would permit him to take advantage——

A. I don't know whether he told me that or not. He made no changes in the contracts. The contracts as I sold them were the same as when Coastal got them.

Q. He told you that he was having no success in negotiating [197] those changes, did he not?

A. I don't think he discussed those changes with me. I knew he had no changes.

Q. Do you deny, Mr. Wilson, that the Trustee told you he would not employ any broker to sell those contracts?

A. Ask that question again.

Q. Do you deny that the trustee told you at this first meeting that he would not employ any broker to sell those contracts?

A. I don't know what he said to other brokers. He said for me to go out and sell them. I wasn't interested in what he would do with other brokers. I went down there to sell them myself.

Q. He did tell you that he wouldn't pay any commission on the sale of those contracts?

A. Oh, he always said that, but he always paid me, in the final analysis he paid me \$5,000. I kept telling him that he couldn't do otherwise, and Clarence Nielson, who I sold it to, wouldn't pay 5 cents commission. If I had talked \$5,000 to Clarence Nielson he would have given Mr. Stevenot an offer for \$95,000. He wasn't paying anybody any commission.

Q. You knew, Mr. Wilson, did you not, that Mr.

(Testimony of Alex E. Wilson.)

Stevenot was a trustee in reorganization proceedings under the Bankruptcy Act?

A. Of course I knew that.

Q. And he was appointed by the Court?

A. Yes, sir.

Q. And he was subject to the control of the Court at all [198] times? A. That is true.

Q. And you were told by the Trustee, were you not, that he couldn't employ a broker without going to the Court for approval?

A. He employed me, he told me to go ahead. He gave me no contract—

The Court: He wants to know if he said that.

A. Oh. No, he didn't tell me he couldn't employ me. He told me to proceed.

Q. (By Mr. Olson): Is it your testimony that after this first meeting with the trustee you contacted various persons in an effort to sell these contracts?

A. Not only did I contact prospective purchasers, I put ads immediately in the San Francisco Examiner and the Portland Oregonian.

Q. And you eventually contacted a Mr. Clarence Nielson, who ultimately bought those contracts?

A. That is true.

Q. When did you first contact Mr. Nielson?

A. I don't know exactly. I met Mr. Stevenot first in, we will say, July—it was July, '52, July, August, September—I closed the Nielson deal in October—I must have contacted Mr.—I don't know the date. Some place after I first met Mr. Stevenot.

(Testimony of Alex E. Wilson.)

Q. Did you contact him after you had contacted all of these [199] other people to whom you tried to sell the contracts?

A. Oh, I was working on everybody. I just happened to get hold of Mr. Nielson and I finally sold him the contracts.

Q. Well, when did you first actually start negotiating with Mr. Nielson for the purchase of the contracts by him?

A. I don't remember. It must have been——

Q. Was it August or July?

A. I remember I first met Mr. Stevenot in July. August, September or October, somewhere in those three months. I couldn't tell the first date. I haven't my file with me. I have a hundred letters from Clarence Nielson. If I had it here I could probably find the letter, the first one.

Q. You didn't contact Mr. Nielson until after the first time you came to the trustee's office in July of '52, is that right?

A. I don't get your question, what?

Q. Did you contact Mr. Nielson before you came to the trustee's office for the first time in July of 1952?

A. I don't think so. I think I contacted Clarence Nielson after Mr. Stevenot told me to proceed.

Q. Was it several weeks after or——

A. Oh, I don't know, it might have been a couple of months. I can't give you the date.

Q. Not within one week, though?

A. I couldn't tell you. Might have been. I

(Testimony of Alex E. Wilson.)

forget when I [200] first contacted him about it. I couldn't give you that date.

Q. I will show you a letter Mr. Wilson, dated July 9, 1952, and ask you if that is your signature to that letter?

A. Yes, that is right, that is July 9th, so I evidently contacted him before July 9th.

Q. You had contacted Mr. Nielson before?

A. Probably did, if that date is correct on there.

Mr. Olson: I will offer this in evidence on behalf of the trustee, your Honor.

The Court: All right, it will be Trustee's Exhibit A.

(The document referred to was marked Trustee's Exhibit A.)

Mr. Olson: This is a letter on the letterhead of Alex E. Wilson, dated 9 July, 1952, addressed to Mr. F. G. Stevenot, and it states:

"Dear Mr. Stevenot:

"I am progressing in good shape toward selling the timber properties we have discussed.

"Mr. Nielson (Clarence L. Nielson) was called out of town but will be back Friday. He is my prospective purchaser, as I told you.

"Rechecking, I have found that he banks at the Bank of America, Santa Cruz.

"If you are in town Friday I shall phone you.

"Yours truly,

"Alex E. Wilson."

Q. Mr. Nielson had purchased the land over

(Testimony of Alex E. Wilson.)

which the debtor [201] needed a right of way to take advantage of these cutting contracts, is that right?

A. Mr. Nielson had bought the Y Ranch from Mr. Switzer, Senior.

The Court: Is that the one that had the right of way across it?

A. That is the one that had the right of way, yes, sir.

Q. (By Mr. Olson): When did he purchase that land?

A. I don't know when Mr. Nielson purchased it. He purchased it some time before I contacted him. He then owned it. I couldn't tell you the date.

Q. Have you ever represented Mr. Nielson in any transaction? A. Never before, no, sir.

Q. Mr. Nielson was your client, was he not?

A. He was my client, and I started to sell him the Coastal properties, but never before that. I never knew him before that.

Q. Now this petitioner's exhibit 1, this was the offer which Mr. Nielson submitted to the Trustee to purchase these cutting contracts.

A. August 19th?

Q. Is that the offer which Mr. Nielson submitted to the Trustee to buy those contracts?

A. That is the offer he submitted, and I wrote that for him in my office and sent it down to Mr. Stevenot.

Q. That offer was conditional upon Mr. Nielson being able to negotiate certain changes in the Cut-

(Testimony of Alex E. Wilson.)

ting contracts? [202] A. That is true.

Q. Is it your testimony that this offer was then submitted by the Trustee to the Court?

A. I believe he submitted it. The deal was finally closed.

Q. As a matter of fact, Mr. Nielson was unable to negotiate those changes in the cutting contracts?

A. None of those changes were negotiated, but Mr. Nielson then went through with the deal without any changes, because Mr. Stevenot assured me, and assured Mr. Nielson that none of the clauses therein were damaging, and Clarence Nielson made up his mind to go through with the deal as the contracts were.

Q. Exactly what changes did Mr. Nielson want to negotiate in those contracts?

A. No. 1, the contracts—there were 67,000,000 feet of timber. Under the contract all of the timber had to be removed from the land by 1956, an impossible feat.

The contract called for, if that were not done, the contract was terminated and the land owner got the land back and all the moneys paid in before that time would go as liquidated damages.

And No. 2, a very foolish clause, stated that all the land must be cleared. It didn't say that logging shall be done according to State and Federal Laws. So Switzer and Rickard, they contended that the land must be swept out clear. No. 3, when Mr. Switzer sold Mr. Nielson the Y Ranch, he kept the right [203] of way of the road through the

(Testimony of Alex E. Wilson.)

ranch that goes down into the Rickard property and he couldn't get the Rickard timber out of there without that right of way, and Mr. Switzer wouldn't give it up, never did give it up until we changed the contracts here about a month ago.

Q. What efforts were made by Mr. Nielson to negotiate those changes at the time this offer was submitted, or shortly after that?

A. After he bought it?

Q. After this offer, this letter offer was submitted to the Trustee?

A. We didn't make any great effort to change that, because Mr. Stevenot said he didn't think there was anything that would stop us, that according to the clearing clause the Court would probably hold that you cleared the land according to the custom of the District, and I believed that myself. The other clause on the right of way, Switzer gave us some little indication that he might do something if we gave him a little bit more money per thousand board feet and changed the contract.

As far as getting the timber off, at that time we had three seasons to do it. It was in 1952—3, 4, 5, 6—we had three full seasons and a half, and I felt sure and so did Mr. Nielson that if we continued we would have no trouble in taking the 67,000,000 feet off in three seasons and a half.

Q. You did make some effort to negotiate changes?

A. We made a gesture, no great effort at all, just a small [204] gesture.

(Testimony of Alex E. Wilson.)

Q. Didn't contact the land owner?

A. I didn't contact one of them, before Nielson bought the property.

Q. As a matter of fact, Mr. Nielson subsequently presented a new offer to the Trustee, did he not, to buy those contracts?

A. No, he didn't present a new offer, it was always a hundred thousand dollars, he didn't have the money, and I went down to the **Bank of America**, the main branch, and saw Mr. Myers, the Manager of the Branch, and Mr. Micheletti, the General Manager, I even went to see Mr. Boise, the Vice President, who had charge of this \$1,000,000 loan the bank has, and they gave me a letter to the Manager of the Bank of America down in Santa Cruz, Mr. Nielson's bank.

We went back down there, and then we came back on two or three occasions to the main branch of the Bank of America, and finally Mr. Micheletti ended up handling the loan, and he said "Mr. Wilson, we are going to give Clarence Nielson this \$100,000 to buy the contracts," and the Bank of America did loan Mr. Nielson \$100,000.

Q. I will show you what purports to be a duplicate of a letter dated October 11, 1952 from Clarence L. Nielson and Amy K. Nielson to Fred G. Stevenot, Trustee, and ask you whether you have ever seen that document before?

A. No, I don't think I ever saw this before, but this calls for the same deal, a hundred thousand dollars, signed by [205] Clarence Nielson and Amy

(Testimony of Alex E. Wilson.)

Nielson. I suppose this was prepared by you and I suppose you had them sign it. That is for \$100,000 for the contract.

Q. You have never seen that letter before?

A. No, I don't think I have seen this.

Q. Do you recall having a conversation with the Trustee, Mr. and Mrs. Nielson, the Trustee's counsel, Mr. Carr, and myself, regarding this subsequent letter of October 11, 1952?

A. We had several discussions with Mr. Stevenot. Mr. and Mrs. Nielson were up in his office several times discussing this deal.

Q. Do you recall a conversation on October 11th or October 12th, 1952?

A. I wouldn't remember the date. I couldn't tell if I had a discussion or not.

Q. Do you recall a meeting in which the Trustee objected strenuously to Mr. Nielson putting in his offer a condition that the Trustee pay \$5,000 of the \$100,000—

A. Why, of course not, that discussion never took place. If that discussion had taken place Mr. Nielson would have never taken that property. He would have said "I will pay \$95,000 for it." Mr. Nielson never thought of such a thing as paying a commission.

Q. Mr. Nielson refused to put more than \$100,000 into this deal, is that correct?

A. Why, of course. He was very sorry he put that \$100,000 [206] after he got in there. It was a contract that nobody could possibly operate. We

(Testimony of Alex E. Wilson.)

had to change all of them. Last month we changed them all, and Nielson is paying now instead of \$2.00 a thousand which the contracts were, he is now paying \$6.00 for the fir, \$12.00 for the redwood, and \$18.00 for the sugar pine. That is the kind of a deal he had. He couldn't operate under the contracts. I had all the contracts changed, and the Rickards and all of them have given him 10 years to cut it off, not 2 years, but 10 years.

Q. You helped Mr. Nielson negotiate these changes in the contracts, is that right?

A. Yes, sir.

Q. Recently?

A. They were changed about two months ago. Aaron Cohn was employed as a lawyer, he did most of the work.

Q. In fact, Mr. Aaron Cohn was Mr. Nielson's lawyer at the time this sale was made, was he not, the sale of the cutting contracts by the debtor to Mr. Nielson and his wife?

A. Yes. I secured Aaron Cohn for him as his lawyer. I secured Mr. Cohn for him.

Q. And Mr. Nielson was in a hurry to close this sale of the cutting contracts, was he not, because Mr. Cohn was going to file certain quiet title actions?

A. We were in a hurry to close it, Mr. Olson, because the time was so limited. Even then we only had three years and one half, and Mr. Nielson wanted to hold the property for [207] six months so he could take a capital gain before he really

(Testimony of Alex E. Wilson.)

made a resale, so that would only give three years to get out 67,000,000 feet of timber, so we were really in a hurry to close it if we were going to close it.

Q. You obtained a loan from the Bank of America for Mr. Nielson in order that he could make this purchase?

A. Of \$100,000, yes, sir.

Q. Now this sale to Mr. and Mrs. Nielson was not consummated until after the Court had approved it, is that right?

A. It was approved up in this Court by Judge Lemmon. I was present at the time with Mr. and Mrs. Nielson.

Q. And at the hearing and in the Trustee's Petition all of the facts, including the \$5,000 which you were to receive, were presented to the Court, were they not?

A. That is true.

Q. And the sale was not consummated until after it had been approved by the court and all the facts——

A. It was approved that day, Judge Lemmon approved the entire transaction that day.

Q. Now, after the sale of these contracts can you state approximately when you first went back to see the Trustee?

A. Oh, I suppose I was back there immediately. I worked with him continually. It must have been a few days, something of that matter.

Q. Did you then indicate to the Trustee that you

(Testimony of Alex E. Wilson.)

were working on a possible sale of the other assets of the debtor? [208]

A. I didn't have to discuss it, he asked me to sell them. He said it was very important, he was tired, he wanted to get out of the whole thing, they needed money badly, and he wanted me to sell them.

Q. Isn't it a fact, Mr. Wilson, that the Trustee told you that he wasn't interested in a sale of the debtor's property at that time, he wanted to save the debtor's business for the stockholders?

A. Why, of course not.

Q. He never told you that?

A. Oh, of course not. Mr. Carr also told me that the place had to be sold, so did Mr. Stevenot, gave me every assistance in the world, gave me maps, I kept going immediately, went over three states to sell it continuously for eleven months.

Q. You deny that he ever told you that he was not interested in a sale of all of the assets during 1952 or 1953?

A. Why, of course not, he wanted to sell it all the time.

The Court: Did I understand your question that he was not interested in the sale?

Mr. Olson: In an outright sale of the assets, but was interested in preserving the business for the stockholders.

The Court: The witness understood the question?

A. Yes, sir.

Q. (By Mr. Olson): Do you deny that the Trus-

(Testimony of Alex E. Wilson.)

tee told you that if you worked on any proposal that you must act for the proponent, get your compensation from the proponent? [209]

A. Oh, Mr. Stevenot told me that all the time. He told me that with the Nielson deal, he never wanted to pay me—he said, “I don’t want to pay you, I don’t want to go before the Court.”

Mr. Carr, of course, told me all the time, “You don’t have to pay any attention to that because after all he has no authority to pay you, he hasn’t any authority to give you a contract.” He says, “We want to sell it and he wants to sell it, and I am going to see that the stockholders get dollar for dollar, and you will have to bring in—Alex, you will have to bring in an offer where the stockholders are going to be protected, that is what I am mostly interested in, and everyone else, and then we can sell it.”

But he said, “If Mr. Stevenot takes this position that he won’t pay you, then you must appeal to the Court. That is your refuge, and you will be treated honestly if you complete the deal and save this institution.”

Q. Mr. Carr told you that the Trustee had no power to employ you?

A. Yes, definitely.

Q. Nor any power to pay you?

A. He said that was up to the Court. The Court would set my fee.

Q. He told you if the Court had to approve any employment?

(Testimony of Alex E. Wilson.)

A. He said the Court would set my fee and be honest with me. [210]

Q. Now, when Mr. Stevenot told you that you would have to seek any compensation from the people for whom you submitted a proposal you fully understood that, didn't you?

A. No, I didn't understand it, because he told me the same story on the first deal, on the Nielson deal, and then he paid me. In the final analysis he paid me. On the second deal he told me the same story, but at the same time for seven months he had a letter from the buyers stating that they wouldn't pay me. So I knew that he wasn't going to pay me and I knew that he knew the buyers weren't going to pay me. I knew that he was playing a double game there.

Q. He told you commencing in 1952 and on several subsequent occasions continuing throughout 1953 that neither he nor the debtor would pay you then any commission on any sale you might bring in?

A. He always told me that, but when I finally sold the Rickard he paid me, irrespective of his statement, he paid me. And I went to Mr. Carr about the Garcia. I was afraid of the situation, and time after time I told Mr. Carr, I said, "Mr. Stevenot continues to tell me that he wants me to get my commission from the buyer," and Mr. Carr told me, "He is an honorable man, he will pay you."

Q. Did you ever tell Mr. Stevenot about these conversations with Mr. Carr?

(Testimony of Alex E. Wilson.)

A. Why, of course not. [211]

Q. You knew, did you not, that it was a condition of Mr. Nielson's offer to buy these cutting contracts that Coastal pay you \$5,000?

A. Coastal agreed to pay me \$5,000, and did pay me.

Q. It was a condition in the offer submitted by Mr. Nielson?

A. It was no condition in the offer at all. The offer of Mr. Nielson, Mr. Nielson \$100,000 period, and that was paid to Coastal and Coastal paid me a \$5,000 brokerage.

The Court: Just a moment. Didn't you testify before that Mr. Nielson made a demand that \$5,000 be paid to you by Coastal?

A. Your Honor, sir, there was never a mention by me to Clarence Nielson about a commission. I kept away from that because I knew Clarence Nielson very well after the weeks I had worked with him, and I knew that if a commission was ever mentioned that Clarence Nielson would never go through with that deal, and Clarence never knew that I got that \$5,000 until after the papers were out.

He even spoke to me about it, he said, "Alec, I didn't know that you were getting a \$5,000 commission. If I had know that, by gosh I would only have offered \$95,000." He said, "I would have made up the commission to you on the resale of the timber to me."

Clarence would never have gone through with that deal if he knew about the commission. [212]

(Testimony of Alex E. Wilson.)

I wasn't doing anything wrong, because I was entitled to a commission. I am a broker. That is the way I make my living.

Q. (By Mr. *McMurchie*): Did you ever resell any of this timber for Mr. Nielson? A. No.

Q. Now, in July 22, 1953, I think you testified that you received this letter from the trustee which constitutes Petitioner's Exhibit 14, is that correct?

A. Yes, sir, that is true.

Q. You received that letter on July 22, 1953?

A. That is true.

Q. That is the only letter you have ever received from the trustee, is that correct?

A. That is the only letter I ever received from him, and in that letter he tells me that he won't pay me, but of course three hours before he wrote that letter he received a letter from my clients stating that they wouldn't pay me.

Q. How do you know that?

A. I know it, because Mr. Steinberg came in person and delivered me a copy of that letter and I went right over in person two blocks away and delivered the other copy to Mr. Stevenot and he told me that he did it.

Q. How did you receive this letter?

A. I have forgotten whether I got that in the mail or whether [213] that was left on my desk in my office.

Q. But you know you didn't get it until the afternoon of July 22nd?

A. I know it was written on the 22nd of July.

(Testimony of Alex E. Wilson.)

Q. It could just as well have been delivered on the morning of July 22nd, couldn't it?

A. No, it was afterwards, because I was so shocked when I got it, because in the morning I had received Mr. Steinberg's and the Sugarman letter stating they wouldn't pay me and with their offer, and so in the afternoon Mr. Stevenot gets busy and he tells me he won't pay me, after he has taken my client's offer and after he has the deal in his pocket because of me, so he puts me in between.

Q. Mr. Stevenot had told you over and over again during the previous month that he wouldn't pay you a commission?

A. He always did that, but he always paid me.

Q. He told you orally and in this letter he puts in writing?

A. Then he puts it in writing after he receives a letter from the Sugarman's that they weren't going to pay me, so he knew then that nobody would pay me, so he felt very happy about it, I assume.

Q. He simply told you in this letter what he had previously on many occasions told you verbally?

A. Yes, but he already had a letter, he knew that the buyers were not going to pay me, because three hours or four hours [214] before he had a letter from them, which makes it quite different, doesn't it, Mr. Olson?

The Court: Mr. Wilson, don't argue with Mr. Olson.

A. Excuse me, your Honor.

Q. (By Mr. Olson): But he did tell you ver-

(Testimony of Alex E. Wilson.)

bally on many prior occasions, going back to 1952, he wouldn't pay you any commission, when the Sugarman Lumber Company wasn't even in the picture, were they?

A. He didn't say he wouldn't pay me, he said he didn't want to pay me, that he didn't wish to go before the Court and ask for another fee, he didn't like to do that, he said, because he had large fees to pay, and he didn't want to go and ask for more fees.

The Court: But he said first——

A. He said that I should get my commission, yes, sir, that is true, that he wanted me to get my commission from the buyer.

Q. (By Mr. Olson): Now, when you testified, Mr. Wilson, that you had no definite understanding regarding commission until July 22, 1953, you were referring to this letter, were you not?

A. Yes, that is true.

Q. Now, you know, do you not, that Mr. Stevenot, the trustee, turned down that offer he received from Mr. Steinberg on July 22, 1953?

A. Oh, yes, I know that, and I told Steinberg and he told Sugarman on the phone from his office he would have to pay more [215] money, and Sugarman said that he was going to put in another offer. That was just the first offer.

Q. Mr. Stevenot turned it down completely?

A. Oh, yes. It was only for \$3,750,000. I told Steinberg and Margolis that they couldn't get it for that.

(Testimony of Alex E. Wilson.)

Q. You also knew, did you not, Mr. Wilson, that the trustee in June of 1953, that is the preceding month, had filed his first plan of reorganization with the Court, did you not?

A. I didn't know whether he did or not. He never told me about it.

Q. Did you know that the trustee ever filed a plan of reorganization prior to the one involving the Sugarman plan?

A. I didn't know anything about it. I was never informed about what Mr. Stevenot was doing. All I was trying to do was sell the timber and report every day about my actions to Mr. Stevenot.

Q. You knew that Mr. Stevenot, the trustee, was having difficulty in getting the RFC to go along with the plan of reorganization on which he was working, did you not?

A. You mean on the sale to Mr. Sugarman?

Q. No, I am speaking of the plan of reorganization.

A. No, I knew nothing about the plan of reorganization, I couldn't tell you a thing about it, Mr. Olson. Mr. Stevenot never told me a thing about it. I am not a lawyer, I don't know a thing about it. He never discussed it with me. In fact, [216] I don't know what you are referring to.

Q. I refer you to Paragraph 8 of this Petition, Mr. Wilson, which states that during this period a first plan of reorganization of the above-named corporation was pending before this Court, which plan proposed the continuation of the business of

(Testimony of Alex E. Wilson.)

Coastal Plywood & Timber Company. You had no knowledge at all regarding that plan?

A. No, I never knew anything about the plan of reorganization. Mr. Stevenot asked me to sell the timber when I first came in there, and I kept trying to sell the timber. That was my job.

Q. You had no knowledge of this allegation in your Petition regarding this first plan of reorganization?

A. No. I had my lawyer put that in there from the legal standpoint. I don't know anything about it.

Q. You read this, did you not?

A. Certainly, I read it.

Q. And did you also verify it?

The Court: Yes, he verified it.

Q. (By Mr. Olson): Well, did you know that during the months of July and August, 1953 the trustee was trying to obtain the consent of the RFC?

Mr. McMurchie: Mr. Olson, are you talking about whether Mr. Wilson knew when he filed this Petition the first plan was pending or whether he knew it back in July, 1953?

Mr. Olson: I believe Mr. Wilson said he never knew anything [217] about it.

The Court: Yes, that is right, he said he didn't know anything about it.

Q. (By Mr. Olson): Then you knew nothing about Mr. Stevenot's attempt to negotiate with the RFC another plan of reorganization?

(Testimony of Alex E. Wilson.)

A. When you say reorganization, you mean selling to Sugarman?

Q. No.

A. I don't know anything about his business as trustee, he never discussed that with me. He just told me to try to sell the timber and that is what I kept trying to do. I didn't know anything about it.

Q. Now, Mr. Wilson, you testified regarding contact with various people regarding a possible sale of the assets of Coastal Plywood & Timber Company? A. Yes, sir.

Q. None of those people ever purchased any assets of the debtor or participated in the trustee's plan involving the sale to Sugarman Lumber Company, did they?

A. I never got anyone to buy anything until I got hold of the Sugarman crowd.

Q. When you took some of these people over this property did you first get permission from the trustee or from the—company?

A. Oh, I had the permission of the trustee always. I told Mr. [218] Stevenot at the times I went to take people, he said certainly. Of course, I had to do that to show them the timber.

Q. Now, in your Petition you allege you submitted to William Steinberg a proposal for the purchase of the debtor's assets. This was in April, 1953, is that correct? A. April, 1953, yes.

Q. Exactly what was this proposal that you submitted to Mr. Steinberg?

A. Oh, the proposal, it is not a legal proposal,

(Testimony of Alex E. Wilson.)

it is like every broker proposes. I would say, "Mr. Steinberg, Mr. Stevenot has told me to get \$4,000,000, here is the report, here is how much timber there is. If your clients want to make a deal let's start in on it."

That is the way you sell timber.

I don't know what you mean by a proposal.

Q. I am merely taking the language from your Petition, Mr. Wilson.

A. Well, that is the language that my lawyer—that is the language of my lawyer. You are a lawyer. You know how these petitions are made.

Q. Now, I believe you testified you supplied to Mr. Steinberg the various information given in Petitioner's Exhibit 13, is that correct?

A. That is true.

Q. Is it also your testimony, that all of those items were compiled [219] by the trustee?

A. Everything that I received outside of the maps that I had made by Hammon, Jensen & Wallen were given to me by Mr. Stevenot, everything except the maps from Hammon, Jensen & Wallen, which I paid for myself.

Q. Does that include this letter from Speckert Lumber Company?

A. Oh, of course not, let me explain that. I didn't see that.

Q. Well, look at it again.

A. Well, we will read them over.

Detailed inventory. That was given to me by Mr. Stevenot.

(Testimony of Alex E. Wilson.)

Letter from Speckert Lumber Company stating they will take this sugar pine from Coastal at \$60 a thousand. No, I gave that to Mr. Steinberg and Mr. Sugarman because there is about 7 per cent of sugar pine on this Garcia Tract. There are very few mills in California that can cure sugar pine properly.

Q. If your Honor please, I think we are consuming time. Will you designate which items were supplied by the trustee?

A. The detailed inventory was given to me by Mr. Stevenot.

Total cruise of Coastal Plywood Timber was given to me by Mr. Stevenot.

Coastal report of trustee. That was given to me by Mr. Stevenot.

Property map of Coastal Plywood Company, showing location of timber. That was given to me by Mr. Stevenot. [220]

Q. Wasn't that a map that you got from Hammon, Jensen & Wallen?

A. Oh, no, Mr. Stevenot gave me a very beautiful map which was colored. I later gave it back to him. The maps from Hammon, Jensen & Wallen were not colored.

Q. The other three or four items out of the total of seven were obtained by you, not supplied by the trustee?

A. They were obtained by me at great expense, because the Sugarman Company demanded that I sell all the sugar pine for them too before they put

(Testimony of Alex E. Wilson.)

the money up. That is the letter from Mr. Speckert after I went to Marysville and took him over the property for three days, and he guaranteed to buy all the sugar pine at \$60 a thousand delivered in the pond.

The other article there is—the financial report of Mr. Holm, Mr. Sugarman phoned Mr. Steinberg, and he said, “Well, Mr. Holm will buy this timber, so said Wilson. Let’s have the financial report from him.”

So I went over and got a financial report from Mr. Holm.

Q. Those were items not supplied by the trustee? A. Oh, those two obviously were not.

Q. Now, shortly after the trustee refused this offer of July 22 from Mr. Steinberg, you called upon the trustee, did you not, to find out whether he had received such offer?

A. I suppose I did. I called on him practically every day I was in San Francisco when this deal was on, trying to keep track of it, because I called on the 22nd when I got the letter [221] from Mr. Stevenot that he wasn’t going to pay me, I would like to have sat in on those meetings, but Mr. Stevenot never would call me on those meetings. I suppose he thought he would have to pay me then.

Q. You called upon Mr. Stevenot on July 22nd?

A. No, I don’t whether I did or not.

Q. Now, during one of those calls shortly after the submission of that offer by Mr. Steinberg the

(Testimony of Alex E. Wilson.)

trustee asked you, did he not, whether Mr. Steinberg had agreed to compensate you?

A. He asked me about commission, and I said, "No, I can't get any commission," because you see Mr. Stevenot at that time didn't know that I knew that he had a letter saying they weren't going to pay me, but I knew that.

I also had his letter that he wasn't going to pay me, and I said, "I have a letter from Mr. Steinberg, I think he feels sorry for me, he is going to give me \$25,000 to cover my expenses if he gets paid."

I told Mr. Stevenot that, because I thought maybe he might break down and say, "Well, I am going to pay you your brokerage fee."

Q. You simply told him that Mr. Steinberg agreed to pay you \$25,000, isn't that right?

A. Oh, no, of course not. You don't think \$25,000 is the commission on a \$4,500,000 deal, do you, Mr. Olson? [222]

The Court: Don't argue with counsel.

Q. Oh, pardon me, excuse me, excuse me, your Honor.

The Court: As a matter of fact, it is not important what Mr. Olson thinks. What is important is what I think.

Q. (By Mr. Olson): Now, during 1953, Mr. Wilson, did you ever meet any of the officers of the J. J. Sugarman Co.?

A. I never met any of the officers of J. J. Sugarman Co. because on the 22nd day of July when I

(Testimony of Alex E. Wilson.)

got that letter from the Sugarman Company that they wouldn't pay me and on the same day I got a letter from Mr. Stevenot that he wouldn't pay me, I went back to Mr. Steinberg's office and I called Mr. Sugarman on the telephone in Los Angeles and I said, "Mr. Sugarman, did you ever have an understanding with anybody that you were going to pay me a commission on this deal?"

He said, "Of course not, I am not going to pay you, we are not going to pay anyone a commission. We are buying this property, we are not selling it." He said, I will tell you, Coastal will pay you, if anybody. I suggest you call him up and see what he thinks."

I called Mr. Margolis up on the telephone at the Fairmont Hotel and I told him what Mr. Sugarman said, and Mr. Margolis said, "I feel the same way. We are buying the property, we are not selling" and he hung the telephone up in my ear.

After that, when the negotiations were going on, they never called me into those meetings. [223]

Q. When was this that you contacted Mr. Sugarman and Mr. Margolis?

A. That was either on the 21st day of July when I received those letters that I wouldn't be paid or a day or so later. Those telephone calls were made from Mr. Steinberg's office in San Francisco with Mr. Steinberg present.

Q. Now, did you know that when the Trustee turned down Mr. Steinberg's offer the J. J. Sugar-

(Testimony of Alex E. Wilson.)

man Co. lost interest and dropped out of the picture?

A. Yes, I knew all about it, because I met time after time with Mr. Jamison and his son and worked day after day with them trying to get them to take it.

Q. You knew that Mr. Steinberg was representing Mr. Jamison from August until October?

A. I knew he was associated with him in some way, I didn't know whether he was representing him or what he was doing. I was trying to sell the timber to him. I don't know what his position was, but I met with him many many times.

Q. You introduced Mr. Steinberg to Mr. Fred Holm, is that correct? A. That is true.

Q. When was that?

A. Oh, let me see. I might get it here. I think it was in June, 1953. I believe that was the date, some time in June.

Q. Is Mr. Holm one of your clients? [224]

A. I had first tried to sell him the Rickard Tract.

The Court: No, is he one of your clients? Do you want to know now?

Mr. Olson: No, was he one of your clients when you introduced him to Mr. Steinberg?

A. Yes, he was one of my clients. I hadn't yet succeeded in selling him anything, but he was one of my potential buyers.

Q. Mr. Holm wanted to buy one portion of the timber owned by the debtor, did he not?

(Testimony of Alex E. Wilson.)

A. Yes sir, he wanted to buy Unit No. 2, 200,000,000 feet.

Q. You relayed that fact to Mr. Steinberg, is that correct? A. I told him that.

Q. And not to the trustee?

A. No, I didn't say anything to the trustee about it. There was no need for my telling the trustee.

Q. How much timber was there in Unit 2?

A. Well, I think about 1,153,000, to be exact, 1,153,000.

Q. Mr. Holm was originally willing to pay \$9 a thousand for that timber, was he not?

A. He would pay \$9 with the land with some additional property that he wanted, something on the coast, some additional little property. I have forgotten what they were.

Q. Was this while Mr. Steinberg was representing Mr. Jamison?

A. I don't know if that was the same——

Q. During what period did Mr. Holm, at what time did Mr. Holm [225] first offer to buy this Unit 2?

A. I don't remember. I have a letter that I have introduced in evidence where Mr. Holm is first writing to me. That would be the date. I have the letter here, and I can't place it, it is confusing, all these dates, but there is a letter in evidence from Mr. Holm where he first makes me the offer. I don't know what date that is.

Q. You and Mr. Steinberg were going to sell this

(Testimony of Alex E. Wilson.)

Unit 2 to Mr. Jamison, were you not, at a price of \$8 a thousand?

A. Oh no, we were going to sell all—Mr. Jamison was never given Unit 2. He was supposed to buy the whole Garcia Tract.

Q. He was going to buy it all?

A. The Garcia Tract.

Q. And then you were going to resell, among others, Unit 2? A. For Mr. Jamison?

Q. Yes?

A. No, there was never such a deal with Jamison for a resale. No, he was supposed to buy it and then it blew up and he didn't buy it. There was never any talk for me to resell for Mr. Jamison. Never.

Q. Did you ever meet Mr. William Moore?

A. I have never met Mr. William Moore or any of the other Hollow Tree people. I met them only at the trial.

Q. Before Judge Murphy in April?

A. Before Judge Murphy. That is the first time I met them. [226]

Q. You have never met any of the people to whom Sugarman Lumber Company sold portions of the debtor's property except Mr. Holm?

A. No. That is why I brought Fred Holm into the picture, he did all that. That is why I got him into the picture, because he knew the men. I had sold him already 200,000,000 feet. That was his job, and I had him work with Mr. Steinberg, and I worked with them. I met with Mr. Steinberg and Mr. Holm time and time again on this resale.

(Testimony of Alex E. Wilson.)

Q. Your contact with Mr. Steinberg and Mr. Holm? A. Why, of course.

Q. Now, you knew, did you not, that after the beginning of 1954 Sugarman Lumber Company negotiated new contracts with Mr. Holm and Hollow Tree? A. Certainly, certainly.

Q. And that all of these contracts provide for the sale of portions of the timber over a long period of time?

A. That is true. Yes, I knew that.

Q. Now, you mentioned a commission that you had coming on a sale to Mr. Holm, who was to pay that commission?

A. Commission, I never got any commission from Mr. Holm.

Q. No, you mentioned that you sacrificed a commission.

A. Oh, I said ordinarily if I or any broker who would sell like I did 200,000,000 feet of timber to Mr. Holm, I get a dollar a thousand for selling timber, not 5 per cent. I would make [227] \$200,000, but I didn't do that. Mr. Stevenot was telling me I wouldn't be paid, ordinarily I would have said, "O.K., then I will take \$200,000." But I sacrificed that. I said, "I won't take the \$200,000, Mr. Holm, we will give the stockholders the benefit of that money and the purchasers."

Q. Is that a commission you would have collected from the Sugarman Lumber Company?

A. No, I would have collected it from Mr. Holm.

Q. From Mr. Holm?

(Testimony of Alex E. Wilson.)

A. Why, certainly. That is the way every broker does.

Q. Well, if you had collected that commission would Mr. Holm have paid Sugarman Lumber Company less for the timber?

A. Why, certainly, if I would have added a \$200,000 commission on there, Fred Holm would have had to pay more money, wouldn't he? He would either have to pay more money or the Coastal Plywood Company would get less money.

Q. Well, you saved this commission for Mr. Holm, did you not? A. Pardon?

Q. You saved this commission for Mr. Holm?

A. I saved it?

Q. Saved. This commission that you didn't collect represented a saving to Mr. Holm?

A. No, I saved that for Coastal Plywood Company. Coastal Plywood Company got the whole amount of money that Mr. Holm paid without one cent of commission to anybody. [228]

Q. Coastal Plywood & Timber Company did not sell any timber to Mr. Holm, did they?

A. Oh, well, they didn't directly, but that helped make the deal. If we hadn't sold for Sugarman, Sugarman would never have bought the property. He so notified us in the letter, the letter is here, you know that. We had to resell before Sugarman would purchase. We did just that.

Q. I believe you mentioned you were present at a hearing before Judge Murphy in April?

A. I don't hear you, Mr. Olson.

(Testimony of Alex E. Wilson.)

Q. I believe you testified here that you were present at a hearing before Judge Murphy in April of this year, 1954?

A. I was, sir, yes sir.

Q. That involved an attempt to set aside the trustee's second plan or reorganization, did it not?

A. Some stockholders trying to set it aside.

Q. And Mr. Steinberg was one of the people who was behind that attempt?

A. I don't know anything about that, I was just there as a listener, I sat there listening and I knew nothing about the case, know nothing about it now, at all.

Q. You knew that Mr. Steinberg was endeavoring to present another proposal and get that substituted?

A. Oh no, I knew nothing about that, Mr. Olson.

Q. Did you hear the testimony at that hearing?

A. I heard some of it. I was in and out. I didn't hear all of it.

Q. You had at least one conversation with the trustee at that hearing, did you not?

A. I believe I did. I have forgotten. I believe I did. I have had several conversations. As I sat with Mr. Stevenot I had several conversations with him.

Q. That is correct. And you told both the trustee and myself did you not, that you were very angry at Mr. Steinberg because of the position that he was taking at that hearing?

A. Oh, I don't recall that I said that I was angry with him, whatever his business was—

(Testimony of Alex E. Wilson.)

Q. Do you recall saying that Mr. Steinberg had washed you out of your commission?

A. Oh, no, no. Steinberg, in fact, was the only one who gave me a contract to pay me anything. I think he felt sorry for me. I felt rather kindly toward Steinberg.

Q. That is what I am referring to. Do you recall stating that Mr. Steinberg was washing you out of your \$25,000?

A. Oh, no, I don't remember telling you that.

Q. Have you ever met Mr. Rudolph, President of Sugarman Lumber Company?

A. I met him at the court hearing.

Q. But not before the hearing in April of this year? A. No. [230]

Q. Have you ever met any other officer of Sugarman Lumber Company?

A. No. As I told you, Mr. Olson, that is why I brought Mr. Holm into the deal and Mr. Steinberg, to do the detail with those gentlemen in the resale.

Q. You brought them in to help you——

A. To help negotiate the deal, yes, to make it possible for Coastal to sell the properties, because Mr. Sugarman—Mr. Margolis had notified us that we must resell before he bought. So I needed Mr. Holm. I brought him into the picture, and I needed Mr. Steinberg, because he was the contact with Sugarman. Mr. Holm was the man who had the contact with the mills that were going to purchase. So I had to have both of them.

Q. Now, Mr. Wilson, it is true, is it not, that all

(Testimony of Alex E. Wilson.)

the letters that you wrote to the trustee have been introduced into evidence at this hearing?

A. I don't know that that is all of them. That is all that I have. I didn't keep a hundred per cent file.

Q. That is all you recall?

A. That is all I know of.

Q. Then the trustee only wrote you the one letter, that of July 22nd?

A. I believe that is all I have. He may have written some more, but that is the only one I have.

Q. Do you recall a conversation with the trustee on May 20, [231] 1954 at the Clift Hotel?

A. I do, definitely.

Q. Was anyone else present?

A. His secretary.

Q. At that time you told the trustee that you were going to file a claim against the debtor for broker's commission?

A. I did, I did.

Q. The trustee was quite surprised, was he not?

A. I don't know whether he was surprised or not.

Q. He reminded you, did he not, of his letter to you and his repeated advice that neither he or the debtor would pay you any commission on any sale of Coastal property?

A. That he or the debtor. Yes, he told me that.

Q. And you told him you would acknowledge all that, didn't you?

A. Oh, I said, "Certainly, I have already given it to my attorney." I said, "you didn't have any

(Testimony of Alex E. Wilson.)

right to write me that sort of a letter, Mr. Stevenot."

I said, "I pulled you out of a terrible hole, and all the rest of you and I sold the property for you," and I said, "You didn't have any right to say that you wouldn't pay me, because as I understand it it is up to the court, and I think you should have paid me, Mr. Carr told you that you should pay me, but you won't do it, so I will just have to sue you. I hate to do it, Mr. Stevenot. I have learned to be very fond of you, but if I [232] must go to court for justice I will just have to do it."

That was the conversation at the court.

Q. Well, the fact is, isn't it, Mr. Wilson, that you never intended to collect a commission from the debtor until April of this year when you found that you couldn't collect your \$25,000 from Mr. Steinberg?

A. Oh, no, I don't consider \$25,000 a commission on this deal. That would be ridiculous.

Q. But you never told the Trustee that you were going to seek a commission until May of this year?

A. I didn't tell the Trustee that because I knew that the Trustee was giving me double talk. You see I knew that the Trustee had a letter on the 22nd of July that the buyer would not pay me. He had that letter. I had a copy of it too.

Q. Just a moment, Mr. Wilson. Now you have already stated that his letter of July 22nd simply expressed what he had verbally told you on prior occasions?

(Testimony of Alex E. Wilson.)

A. That isn't what I am saying to you, Mr. Olson.

Q. You got that?

A. I acknowledged that letter, but I also stated, Mr. Olson, that Mr. Stevenot had another letter on the 22nd from the purchaser saying that they wouldn't pay me, but Mr. Stevenot went along for seven months telling me, "Mr. Wilson, you get your money from the buyer," when he knew they weren't going to pay me, he was notified in writing, on July 22nd. [233]

Q. Have you ever received any commission or compensation on any transaction in which the debtor or Mr. Stevenot was involved?

A. I have never received one cent from anyone in connection with any of the Coastal Plywood properties except the \$5000 that Coastal paid me for the Nielson sale.

Q. Or any other transaction in which the Trustee was involved?

A. Never one nickel have I received from any human being.

Q. So then when you testified both on June 21st and again this morning, Mr. Wilson, that "Mr. Stevenot always paid me in the final analysis," you were referring only to the sale of the cutting contracts, is that right?

A. I am referring to the \$5000 he paid me on the sale of the Rickard, Brush and Remmell contracts, that is true, 5 per cent of \$100,000.

(Testimony of Alex E. Wilson.)

Q. What is the largest block of timber you have ever sold, Mr. Wilson?

A. Well, I can give you—I sold almost a billion feet, I checked the other day, and I have never received less than \$1.00 per thousand.

Q. That isn't my question, Mr. Wilson. What is the largest tract that you have ever sold?

A. The largest timber tract that I sold was 78,000,000 feet belonging to the Bradley Estate of Chicago, which I sold about four years ago to the Feather River Pine Mills at Feather Falls, [234] California. I sold all of the timber.

The second largest was 57,000,000 feet. That was the timber that belonged to the Red River Lumber Company, they are at Westwood, but they have this 57,000,000 feet in Butte, Yuba and Plumas Counties. I sold that to Dant & Russell, to the Oroville Lumber Company, which is owned by Dant and Russell.

And I sold several large tracts, other large tracts of 40 or 50 million, large tracts. I sold the Cascade timber, 40,000,000 feet in Plumas County; Morgan Bar, 20,000,000 feet.

Q. How large is the tract of timber purchased from the debtor by Sugarman Company?

A. It is 36,000 acres.

Q. And how many board feet of timber on that tract?

A. There is 585 or 560 million feet. There is supposed to be — Swede Wallen, the cruiser, told me that there would probably be 200,000,000 feet more

(Testimony of Alex E. Wilson.)

of second growth, that he didn't figure in the merchantable timber. This 585,000,000 or maybe 565,000,000 feet all together, that is first growth timber, and Wallen told me that he thought there was 200,000,000 feet of second growth that he didn't figure.

Q. Now, Mr. Wilson, this involves a large volume of timber, involving a million dollars or more, the customary commission is far less than 5 per cent? A. Is what?

Q. The customary commission is far less than 5 per cent, is it [235] not?

A. Not at all. I have sold almost a billion feet. I have never received—only once did I receive 5 per cent, and that was a sale I sold to Dant and Russell—I sold to Bercut-Richards Cannery, I sold them 60,000,000 feet of Dant & Russell timber. They operate at Gray's Flat, a sawmill in Eastern Yuba County, they offered me \$11.00. It was almost a million dollar sale, it was almost all time, and there was a little confusion who was going to pay me, but, of course, the seller paid me, and I said, "Well, since there has been confusion, I only got you eleven," I took 5 per cent.

But all other timber sales—I sold all of the timber of the Idaho Maryland Gold Mines. They always pay me \$1.00 a thousand.

I sold all of the timber of Fred H-o-l-m-e-s in Yuba County.

Q. Do you know of any recent sales of timber involving as much as 500,000,000 board feet?

A. No. This is the largest timber sale that has

(Testimony of Alex E. Wilson.)

happened in California in 37 years, Mr. Olson. The sale of the Garcia tract is the largest individual sale of timber that has happened in California in 37 years.

The Court: Larger than the sale to Growers Supply?

A. Yes, it was, sir. There was 450,000,000 feet in the Fruit Growers, I have been told—I may be wrong. Mr. Tom Dant told me that was in the Fruit Growers sale. [236]

Q. You have been a licensed broker for 37 years?

A. Yes.

Q. You are aware that a broker cannot demand a commission on a real estate sale unless he has a written contract, in California?

A. Yes, that is so under the California laws, but I understand that that isn't true under the laws that we are appearing under before the Court. I know definitely, I have had experience, I have had many and many a deal in 33 years, and I know that if I haven't a written contract in California, no matter how honest I may be, if a man wants to cheat me out of a commission he can do so.

Q. When did you first realize that that rule may not apply to a matter involving a Federal Court Bankruptcy proceeding?

A. Oh, I found that out in Oroville one day when I was talking to a very able jurist.

Q. That was this year, was it not?

A. This year.

Q. Knowing that a written contract was neces-

(Testimony of Alex E. Wilson.)

sary you still did not seek any written contract with the Trustee, is that correct?

A. I had *a* sought a written contract with the Trustee for a long time, Mr. Olson. There was no need for me to be trying then.

Q. He told you he would not give you any written contract?

A. He didn't tell me he wouldn't give me a written contract. [237] He told me he wouldn't pay me.

Q. Wouldn't employ you as a broker?

A. Oh yes, he employed me, you bet he employed me and worked with me hand-in-glove for eleven months.

Q. Even though you knew that a written contract was necessary for such employment?

A. No, I knew it wasn't necessary for such employment. Mr. Carr told me it wasn't necessary, and he couldn't give me one. Mr. Carr told me in addition to that he had no right to set my fee. Mr. Carr told me that he was surprised at Mr. Stevenot's attitude, he couldn't understand it. Three days ago he said he withdrew from the case, wouldn't come up here. That is why he is not here. He wouldn't have any part in such shenanigans. That is why he withdrew from this case.

Mr. Olson: I move to strike that, your Honor, on the ground that it has no relevancy.

The Court: The motion to strike is granted.

Q. Now you have mentioned a total purchase price, I believe, of \$4,452,000 for these properties?

A. That is right.

(Testimony of Alex E. Wilson.)

Q. Isn't it a fact that it was actually less than \$4,100,000 because of inventory adjustments?

A. Well, there was some slipping back and forth on inventory. I know there was some misunderstanding about the inventory. It was less than it was supposed to be.

Q. Well, as a matter of fact a considerable portion of the [238] inventory was used up by operations during the winter?

A. Well, that may be true, Mr. Olson, but I knew nothing about that, that wasn't any of my business. I had completed my transaction. That was detail for Steinberg and Fred Holm and the others to work out.

Q. (By the Court): In any event you are willing to be bound by the final sales figure, are you not?

A. Yes, sir; yes, your Honor.

Q. Whatever adjustments there may be?

A. Yes, sir.

Q. (By Mr. Olson): Now, this \$25,000 that you have referred to as expenses, were those expenses in connection with your contact with Mr. Steinberg and Mr. Holm in developing—

A. Oh, that was my estimate of the money it had cost me during the entire eleven months. While I am traveling selling timber I appropriate \$50.00 a day, that is for meals and for gas and for entertainment, which runs about \$17,000 for eleven months and a half of work, and then there is advertising,

(Testimony of Alex E. Wilson.)

and I told Fred Holm that I would compensate him for his labors, what he had done for me.

Of course, the idea of splitting a commission, I am sorry he got such an idea. I have been a broker for 33 years. I couldn't split a commission with a man. I couldn't give him any commission at all. He is no broker. I have been a broker for 33 years. My record is just as clean as a hound's tooth. I know I just couldn't do a thing like that. [239]

If Fred has had a misapprehension I am very very sorry.

I told him that I needed him badly because he had the contacts with the mills around there, and I said, "I will pay your expenses, I won't let you be any money out of pocket, but, after all, Fred, you are getting this 200,000,000 feet and that is what you really want, so you are going to be taken care of."

Q. You were going to reimburse him for his expenses even though he was buying the substantial portion of this timber, is that right?

A. Yes. I thought that was only honest to do that, the money out of pocket, that wouldn't amount to very much, his expenses, they wouldn't amount to very much.

Q. And those expenses are a portion of your claim that you are now making against Coastal Plywood & Timber Company?

A. Pardon me, I don't get that question.

Q. Those expenses constitute a portion of your claim which you are now making against Coastal Plywood & Timber Company?

(Testimony of Alex E. Wilson.)

A. Oh, I am making a claim to Coastal Plywood & Timber Company for my commission on the sales price. A broker doesn't count his expenses against it. I have been in many deals where I spent more money than I got as a commission. My claim is based on 5 per cent of the sales price. Whatever I spend is my good fortune or against me. That is the way we operate.

Q. In other words, you expect your 5 per cent regardless of the benefit provided or what you have spent? [240]

A. Oh, I expect 5 per cent or such figure as the Court may deem proper. I feel like Mr. Carr told me, "You have no recourse now but refuge with the Courts."

Q. Now, back to this \$25,000 for a moment, if I understood your testimony correctly you estimated \$17,000 on the basis of a daily allowance for eleven months?

A. Well, eleven months, I haven't figured it up, but \$50.00 a day for 11 months would be \$1500 a month, wouldn't it, ten months, it would be \$15,000, and it would be \$16,500 for 11 months. That would be my—for my work, and then in addition to that I have automobile expenses, gas expenses, I entertain a great deal—you must entertain lumbermen, Mr. Olson, you don't go down to the Palace Hotel and sip a cup of tea, you entertain these men, and it takes money to do that.

Q. This \$50.00 a day is an allowance for your time?

(Testimony of Alex E. Wilson.)

A. That is my time. My time is worth that, Mr. Olson.

Mr. Olson: I have no further questions, your Honor.

The Court: Do you have any questions, sir?

Mr. Dudley: Not very many.

The Court: Well, ask them.

Mr. Dudley: I think he covered most of them I wanted to ask.

Cross Examination

Q. (By Mr. Dudley): Mr. Wilson, who is your attorney?

A. Sterling Carr has been my attorney for many years. Oh, you mean in this case? [241]

Q. Who is your attorney, period?

The Court: Maybe the man has had more than one attorney.

Q. (By Mr. Dudley): How long has Mr. Carr been your attorney? A. I would say 25 years.

Q. And he has been your very good friend for 25 years, too, is that correct?

A. I think he is one of the most honorable men I have had the pleasure of meeting in my life.

Q. You therefore seek his advice about many things, is that correct? A. Many things.

Q. In all your business dealings do you seek his advice? A. Not all of them.

Q. In a great many of them, shall I say?

A. A great many of them, yes.

Mr. Dudley: That is all I have, your Honor.

The Court: Any further questions?

Mr. McMurchie: I have no questions, your Honor.

The Court: All right, step down, please.

We have arrived at 4:30 and we are not going to be able to get through with Mr. Stevenot because there is going to be substantial cross examination on the direct examination, and I anticipate that there is going to be considerable direct examination.

Mr. Olson: That is correct, your Honor.

The Court: So we are up against the same [242] proposition we had before, a time for further hearing. Are there any motions to be made at this stage of the proceedings? Have you concluded your evidence?

Mr. McMurchie: Well, I have some evidence I wanted to introduce, your Honor, some particular pleadings in the file.

The Court: What are they?

Mr. McMurchie: Well, I am referring to the petition of Mr. Wilson, which I understand must be introduced in evidence under the Federal Rules of Procedure. I also want to call attention to the second plan of reorganization and some other documents.

The Court: Well, do you have the documents? I think you better read what you want or call the Court's attention to them. I am not going to look at them right now. I mean what documents are you referring to?

Mr. McMurchie: Well, the documents I specifically refer to, I would like to offer Mr. Wilson's petition which has been filed in this matter into

evidence to be considered along with his testimony on the stand.

The Court: That is in the form of an affidavit?

Mr. McMurchie: Yes, it is in the form of an affidavit.

The Court: Well, that is before me.

Mr. McMurchie: I realize that. I just understood it was not formally introduced without being offered.

The Court: It is not in evidence.

Mr. Olson: I know of no such law, your Honor, [243] that the petition has to be introduced in evidence.

The Court: I know of no reason why it has to be. It is before me.

Mr. McMurchie: I should also like to introduce, your Honor, the Order of this Court that was made in the Nielson matter, I believe it is in File 4.

The Court: All right, that is appropriate, unless it is already in evidence in some other form.

Mr. McMurchie: No.

The Court: But you will stipulate to that, won't you, Mr. Olson?

Mr. Olson: Yes, the entire file relating—anything that is in the record before this court, of course.

Mr. McMurchie: Yes. I just wanted to particularly call that to the Court's attention.

The Court: If that is satisfactory with you, then all the files will be in evidence.

Mr. McMurchie: Well, I just thought I would

point out to you what files I am interested particularly in.

The Court: Yes, that is perfectly all right. And then when you come to argument you can refer to them. Do you agree with Mr. Olson that all the files be admitted into evidence?

Mr. McMurchie: Very satisfactory.

The Court: That will be the order, and then you can refer to all the documents you wish. [244]

Mr. McMurchie: I assume that you are there including the financial reports of Coastal which are in the files.

Mr. Olson: Well, all the matters in the record, yes.

The Court: Now then, does that conclude your presentation?

Mr. McMurchie: I have just one other document that I would like to offer, your Honor, and that is a certificate by the Secretary of State of the State of California showing the incorporation of the Sugarman Lumber Company on November 6, 1953. It is introduced only to corroborate Mr. Steinberg's testimony that this company was formed for the purpose of purchasing the assets of Coastal Plywood & Timber Company.

Mr. Olson: I don't believe that corroborates that testimony. This simply states that articles were filed——

The Court: Well, he said that there was a corporation formed about that time, and if that is true I will admit it into evidence, I don't know what probative value it will have or what weight

it will have, but it is admissible, and it will be admitted as Petitioner's exhibit next in order.

(The document referred to was marked Petitioner's Exhibit No. 15.)

Mr. Hildebrand: As long as this matter has to go over, your Honor, anyhow, we did have in mind putting Mr. Stevenot on for some questions on cross examination.

The Court: Yell, you are not going to be lost—oh, that is part of your case?

Mr. Hildebrand: If we could terminate the case [245] today without him we would be willing to do it.

The Court: No, unless there is some matter of law that would terminate it, but in any event, as I take it, you want, as a part of the Petitioner's case to call Mr. Stevenot as an adverse witness.

Mr. Hildebrand: That is right.

The Court: So your case thus far is not in and you are not at a stage where a motion can be made as a matter of law.

Mr. McMurchie: That is right.

Mr. Hildebrand: We would waive that if we thought we could terminate it this afternoon, but as long as we can't terminate it we would feel better satisfied if we could cross examine Mr. Stevenot.

The Court: Well, Mr. Hildebrand, I don't want to, in effect, cross examine you, but the point is if you waive it then Mr. Olson will make his motions, as I understand it.

Mr. Olson: That is right.

The Court: —Based on the evidence, and if

you don't waive he can't, and I am not going to force you to waive. I mean that is something you have to decide.

Mr. Hildebrand: We would feel better satisfied if with the approval of the Court we could cross examine Mr. Stevenot at the next hearing.

The Court: Yes, as a part of your case.

Mr. Hildebrand: Yes. [246]

The Court: Well then, you have a right to do that. I am not going to foreclose you from that. But then that stops the motions.

Well, in that situation we have to discuss time.

(Discussion as to time of further hearing of this case.)

(Thereupon the further hearing of this matter was continued until August 2, 1954, at 10:00 a.m.) [247]

Monday, August 2, 1954

The Clerk: Case No. 12,223, In Re Coastal Plywood and Timber Company, Petition for Agent's Fees.

Mr. Hildebrand: We would like to call Mr. Stevenot for the purpose of cross examination, if your Honor please, as part of our case.

The Court: You mean under Rule 43 (b)?

Mr. Hildebrand: Under the rule, your Honor, yes.

The Court: As an adverse witness?

Mr. Hildebrand: As an adverse witness.

The Court: All right, Mr. Stevenot, step forward and take the oath.

Will this conclude your case?

Mr. Hildebrand: I think so, your Honor, unless there is a document or something like that that Mr. McMurchie still has in mind.

FRED G. STEVENOT

called as a witness by the Petitioner, sworn.

Direct Examination

Q. (By Mr. Hildebrand): Mr. Stevenot, you are the Trustee, appearing as Respondent to this Petition on file in this matter? A. I am.

Q. And as Trustee you have been represented by counsel, Mr. Olson, who is here, and also by Mr. Sterling Carr, is that correct? [250]

A. That is right.

Q. And along in June or July of 1952 did you meet Mr. Alex Wilson, the Petitioner in this matter, for the first time?

A. As I recollect, yes.

Q. And do you recall if he was referred to you by one of your attorneys, Mr. Sterling Carr?

A. Well, I recall that he came over at the suggestion of Mr. Carr at that time, at that meeting. I have no knowledge of that.

Q. You didn't have any knowledge of the fact that he came over at the suggestion of Mr. Carr?

A. No, not when I first met Mr. Wilson, no.

Q. But you found out later on that that was true, didn't you?

A. I think later on Mr. Wilson informed me

(Testimony of Fred G. Stevenot.)

that he had been talking to Mr. Carr and Mr. Carr had suggested that he come over to see me.

Q. Yes. And Mr. Wilson did inform you that his reason for coming over to see you was at the suggestion of one of your attorneys, Mr. Sterling Carr, is that right? As your meetings with him progressed you learned that?

A. Well, Mr. Wilson may have stated that to me.

Q. Yes. A. I will say he might have. [251]

Q. Yes. He testified here that he advised you—does that refresh your memory at all?

A. Yes, I recall that.

Q. That he advised you that he had come over to see you at the suggestion of Mr. Carr?

A. Yes, that he had been talking to Mr. Carr.

Q. Yes.

A. And Mr. Carr referred him to me.

Q. Yes. A. That is right.

Q. All right. Then when you saw him the first time did you discuss with him the possibility of selling some of the Coastal Plywood properties?

A. No, I did not.

Q. Did you discuss the so-called Nielson deal with him, those various cutting contracts that eventuated in the Nielson deal?

A. My recollection is that in July he came in and told me that he understood that they were for sale and that he had a buyer.

Q. And when you first saw him did you discuss that you would like to sell these contracts?

A. No, I did not.

(Testimony of Fred G. Stevenot.)

Q. Did you see him on several occasions along in June or July of 1952? [252]

A. In July at the time that he came in I told him that I was engaged in negotiating changes in the contract that would enable Coastal to take advantage of the additional timber, if we could work out changes in the agreement so that we could get into the timber, and also some modifications of the provisions of the contract with the Rickard group.

Q. There were these three contracts known as the Rickard, Brush and Rimmell contract that you were talking about? A. That is right.

Q. And you explained to him about those contracts and that you would like to sell those cutting contracts some time along in June or July, did you not?

A. Well, in July, to be exact, he came in and told me that he had a customer, that he understood that they were for sale and that he had a customer for them, and at that time I told him that I was engaged in attempting to re-negotiate the contracts. That was at our meeting in July.

Q. And did you tell him on any of these occasions that you wanted to get \$100,000 cash for these cutting contracts?

A. Later on, that is right.

Q. And about when was that, did you tell him that?

A. That was in the latter part of July, I believe, or first part of August.

Q. Then did he come back and tell you that he

(Testimony of Fred G. Stevenot.)

had a buyer, Mr. Nielson, who would pay \$100,000 for those contracts? [253]

A. As I recall, he told me that he thought he could make a deal with Mr. Nielson of Santa Cruz.

Q. And you didn't have any written contract with him that you would pay him any broker's commission on those contracts, did you?

A. No, but at the same time I told him that I wouldn't pay, not recommend a broker's fee, that he must secure his compensation from the buyer.

Q. You told him that on a number of occasions?

A. I told him that on a great many occasions.

Q. And on each occasion he told you that he would try to do that, but that was a very hard thing to do, isn't that right?

A. No, he did not qualify his statement. He understood it.

Q. Didn't he tell you on a number of occasions that in his many years of experience as a real estate broker handling timber deals that the seller always paid the commission?

A. I recall on one occasion that he told me it would be difficult to do, but that didn't change my opinion.

Q. And you didn't have any prior authorization from the Court for the payment of any commission on this Nielson matter, did you?

A. Later on I did, yes.

Q. Well, you later got the authorization for the payment of that brokerage fee? [254]

A. That is what I am referring to.

(Testimony of Fred G. Stevenot.)

Q. But before that authorization of the Court was made or that order given by the Court you had no prior authorization? A. No.

Q. And you had no written contract or agreement to pay a brokerage fee?

A. That is right.

Q. As a matter of fact, the only agreement or understanding you had with him was that you told him to try to get the fee from the buyer, isn't that right?

A. I told him beyond that, that I would not pay any commission.

Q. And you told him that you had to get the Court authority for anything that you did, didn't you?

A. Yes, he understood that. That may have come up in the conversation.

Q. But he went ahead and made the sale and finally, pursuant to your request, the Court made this order of the 12th of November, 1952, and I am reading now from the Court's record, a part of the Court record, your Honor:

"3. That Fred G. Stevenot as Trustee herein be and is hereby authorized to pay A. W. Wilson from said sum of \$100,000 a commission on said transaction in the amount of \$5,000.00."

That was a portion of the Court's order, wasn't it? [255]

A. Yes, it was a condition imposed upon me by Mr. Nielson.

(Testimony of Fred G. Stevenot.)

Q. Yes. Mr. Nielson, as a buyer, did not want to pay the commission, did he?

A. Beyond that he insisted that I pay Mr. Wilson \$5000.

Q. Because he didn't want to pay anything out of the \$100,000, isn't that right?

A. He didn't want to pay any more than the \$100,000.

Q. That is right. The deal was for \$100,000 and so if any commission had to be paid it had to be paid by you as Trustee pursuant to the Court's order, is that right?

A. Yes. If I was willing to reduce the amount coming to Coastal to \$95,000 and agree to pay at Mr. Nielson's demand \$5000 to Mr. Wilson that would take place, certainly.

Q. All right. Now, then, after Mr. Wilson sold these Nielson cutting contracts—and there wasn't any question about the fact that he sold them, was there? A. I don't get that.

Q. There wasn't any question about the fact that Mr. Wilson put over the Nielson deal, was there? He sold the contracts, didn't he?

A. He sold the contracts—let us put it this way: As far as I was concerned, Mr. Nielson purchased the contracts.

Q. Yes, but the man who put the deal over as the broker, whether he was to get paid or not, was Mr. Wilson, was he not? [256]

A. Well, that may have been a fact, but nevertheless he was not representing me up to the time

(Testimony of Fred G. Stevenot.)

that I accepted the demand of Mr. Nielson that I pay \$5000 to Mr. Wilson.

Q. Well, he put the deal over for you, didn't he?

A. I have no doubt but what he secured Mr. Nielson, yes.

Q. You didn't know Nielson, did you?

A. No, that is right.

Q. You didn't have anything to do with selling the timber? A. I will grant that.

Q. All right. Then after he put the deal over for you on the Nielson matter he came in and you talked with him about selling the rest of the timber, did you? A. No, I did not.

Q. Well, you had various conversations with him about selling the rest of the timber, didn't you?

A. No, I did not.

Q. Why, didn't he write you letters about seeing various people about selling the timber?

A. The only understanding I had with Mr. Nielson was that I was engaged in attempting to develop a plan of reorganization, that I did not wish to sell the timber, any of the timber.

Q. Did you tell him you wanted to sell all the timber in a block? A. I did not.

Q. At any time you never told him that? [257]

A. I did not.

Q. Didn't he report to you that he was contacting various people, and write you letters that were procured here in the files, from your files, telling you that he was seeing people and trying to sell the timber?

(Testimony of Fred G. Stevenot.)

A. That was in spite of the fact that I told him in the first instance that I did not wish to sell the timber and in the next instance that I would not pay a commission, and that I was busily engaged in developing a plan of reorganization.

Q. Did you ever make any effort to sell the timber?

A. No, sir, not at that time.

Q. At any time did you ever make any effort?

A. Not as a body of timber, but sell the property as a unit.

Q. Well, to whom did you try to sell the timber?

A. Why, to various people.

The Court: He said he did not try to sell the timber, he said he tried to sell the property.

Mr. Hildebrand: The property.

A. The whole property, as a whole, yes, sir.

Q. When did you try to sell the property as a whole?

A. Why, any number of people came into my office, and there were at least eight or ten plans submitted, but at no time did I attempt to sell the timber as a unit.

Q. But the plans never came to anything, did they?

A. That is true, unfortunately, it did not at that time. [258]

Q. So that you, yourself, had no success in selling the property for the company as a unit?

A. Well, up to July when I was put on notice by the R.F.C. that they would not go along on the

(Testimony of Fred G. Stevenot.)

first plan of reorganization, then I decided that it would be necessary to sell the property as a whole.

Q. Prior to that you had been getting a barrage of letters and a great deal of information from Mr. Wilson as to contacts that he had made in attempting to sell the property, hadn't you?

A. Mr. Wilson wrote me a letter describing the contacts that he had made. I did not direct Mr. Wilson in any way, shape or form to contact people.

Q. Well was there any difference between the contacts that he made before the Nielson deal and your relations with him than the contacts or the relations after the Nielson deal?

A. Well, he never did represent me.

Q. Well, before the Nielson deal you say he didn't represent you, is that right?

A. He didn't represent me then. He represented Mr. Nielson.

Q. So far as the situation was concerned after the Nielson deal it was just the same as it was before, wasn't it?

A. Well, it may have been in his mind, I don't know, but it wasn't in mine. The same situation existed as to my instructions to him. [259]

Q. Now here, under date of the 9th of July, 1952—I think these original letters are in evidence here—perhaps I better refer to the exhibit numbers.

Mr. McMurchie: No. 10.

Mr. Hildebrand: This is Exhibit No. — This is the one I want to refer to first, Trustee's Exhibit No. A, this letter here, on the 9th of July, 1952?

(Testimony of Fred G. Stevenot.)

Do you recall that, receiving that letter from Mr. Wilson? (Exhibiting document to witness.)

A. Yes, I——

Q. You recall receiving the letter, all right. Now I will ask you some questions about this. The letter reads:

“Dear Mr. Stevenot:

“I am progressing in good shape toward selling the timber properties that we have discussed.”

You say that you didn’t discuss any timber properties with him prior to that time?

A. Mr. Wilson came in and he was interested in securing permission to sell the cutting rights. He came in any number of times. I do not recollect every meeting I had with him. He came in a number of times and a great many other people came in.

Q. And then he said: “Mr. Nielson, Clarence L. Nielson, is called out of town but will be back Friday. He is my prospective purchaser, as I told you.” [260]

Now he had told you about Mr. Nielson, hadn’t he?

A. Yes.

Q. Before he wrote you this letter?

A. Yes, but that doesn’t alter the situation that I was not engaging Mr. Wilson to sell the cutting contracts and pay him a commission. That is a definite position——

Q. In spite of that, though, you did pay him a commission, didn’t you?

A. Prior to what?

Q. In spite of that.

The Court: He said “In spite of that?”

(Testimony of Fred G. Stevenot.)

A. Yes, I did, but it was a condition imposed on me by Mr. Nielson and it was submitted to the Court.

The Court: In that connection did you ever discuss with Mr. Nielson the proposition of reducing the price of the cutting rights as far as the estate was concerned to \$95,000 and letting Mr. Nielson take care of Mr. Wilson?

A. I did, your Honor, exactly that.

Q. And what happened?

A. Mr. Nielson refused to do it. He said the time element was very important, and it was, he figured that he had to engage in litigation to get in and secure the timber, and he refused to do it. In fact, after submitting it to him and we discussed it he left my office, and it was a question then of whether I would lose the deal, and it was [261] equally important to me to sell the cutting contracts, time was running against the Company, so he left the office and we did not reach a settlement in spite of his offer.

But that afternoon I phoned him after considering it, and figuring it was necessary for me to submit it to the Court, changed my position, because we had about \$40,000 or \$45,000 of the Company's money in the contracts and the contracts would expire in 1956. I realized it would be practically impossible for me to negotiate, which they refused to do—I attempted to negotiate with Mr. Rickard and Mr. Swisher, his attorney, and I was up against the same situation as Mr. Nielson was. We needed

(Testimony of Fred G. Stevenot.)

time to litigate the matter, if necessary, and I was disinclined to litigate it. So finally I agreed that \$95,000 was a fair price, and that I would submit Mr. Nielson's offer to me to the Court, and I did.

Q. (By Mr. Hildebrand): Now, after that, then, after the Court approved the payment of this \$5000 commission, back in November, 1952, did you receive this letter—I think this is in evidence—of the 3rd of April from Mr.—this is our copy of it, I didn't find the other readily (exhibiting document to witness)—do you recall this letter from Mr. Wilson dated the 3rd of April, 1953?

Mr. Olson: May I see the letter? I don't recall that letter.

Mr. Hildebrand: I think that you have a copy [262] of it in your file.

A. Yes, I recall receiving that and also Mr. Wilson coming in and telling me about it.

Q. Yes. A. I do.

Q. Now then, from the third of April—that is nearly four months after this Nielson approval, Mr. Wilson wrote you:

“Dear Mr. Stevenot:

“I have had two unfortunate experiences. First I tried to sell the Coastal timber to the Hammond Lumber Company. Earl Birmingham, now President of Hammond, is a good friend of mine. He also came from Oroville. He finally turned the deal down.

“I then started working with Pacific Lumber. Very much to my disappointment Mr. Murphy said

(Testimony of Fred G. Stevenot.)

he did not want the property. However, we will not be discouraged."

He wrote you to that effect, didn't he?

A. He did, and when he came in I immediately admonished him that I was not willing to sell the timber and also that he was not representing me, and that I would not pay a commission. I repeatedly told him that.

Q. Well, you told him——

A. If you will hear me through. As he sent these letters in to me, after my experience in the Nielson episode where I was obliged and practically forced to recognize a commission [263] I kept repeating, and as far as I was concerned I considered that it was always necessary to keep repeating to him.

Now, he may have written in that he was trying to interest these people in a plan of reorganization, for all I know, because a statement that he was attempting to sell it was in defiance of my instructions to him.

Q. Well, you told him the same thing that you told him about the Nielson property, didn't you?

A. Well, I understand——

Q. Your conversation with him as to the subsequent property after the Nielson deal was practically the same as you had had before the Nielson deal, wasn't it?

A. Well, the inference there would be, naturally, from your question, if I have to answer it that way, that I had just idly instructed him that I would not pay him a commission and didn't mean

(Testimony of Fred G. Stevenot.)

what I said, just because I was obliged under the circumstances to pay him a commission on the Nielson deal did not give him any privilege to go about and sell any timber in defiance of my instructions.

Q. Well, didn't you tell him to try to get his commission from the buyer?

A. Well, I didn't tell him that following that letter, but I originally told him that and had a full discussion and Mr. Wilson accepted the situation.

Q. Didn't he tell you prior—— [264]

The Court: Just a moment. In your own words, Mr. Stevenot, what did you tell Mr. Wilson about what he was to do or not to do in connection with any of the properties of Coastal Plywood, whether in units or in subdivisions thereof?

A. Well, your Honor, Mr. Wilson was, so far as I was concerned in my official capacity, just another broker. I had a number of brokers coming in trying to sell the timber and develop a plan of reorganization, and they would talk about where they were to get their commissions. I instructed them, just as I kept instructing Mr. Wilson. Mr. Wilson, I didn't care to discourage him from bringing in someone provided that I could stand on my position and not pay him a brokerage fee, and at no time did I encourage him to think that I would pay him a brokerage fee.

Q. (By the Court): What, in words, did you tell him, or as near as you can remember, what,

(Testimony of Fred G. Stevenot.)

in words, did you tell Mr. Wilson he could do or not do?

A. I told Mr. Wilson that I wanted to keep the property intact and that I was devoted to developing a plan of reorganization. If he had any client or anyone interested that he could bring them in, but that he should not look to me or to Coastal for a commission. That he had to get his commission from the purchasers or the proponents of any proposition. I definitely, over and over again, stated that.

Q. (By Mr. Hildebrand): And you told him that also before the [265] Nielson deal, did you?

A. Why, certainly.

Q. So the instructions you gave him were the same, both before and after the Nielson deal, is that right?

A. The situation was not the same.

The Court: No, he is talking about what you told him. I don't think Mr. Hildebrand is asking you to make any concession or inference. He just wants to know what you told him. Was it the same as you told him before the Nielson sale?

A. Yes, I told him I would not pay a commission, yes. No question about it.

Q. (By Mr. Hildebrand): Now, when was it that he told you that it was pretty hard to get the commission paid by the buyer?

A. Well, originally in one of our preliminary discussions when he first came in.

Q. And you have had a good deal of—

(Testimony of Fred G. Stevenot.)

A. He did not repeat that afterwards as consistently. He may have mentioned afterwards, I have no recollection, but I know in the first instance when he first came in that it was customary for the seller to pay.

“Well, this is a different situation,” I told him, that I would not further impoverish the situation that the equity stockholders had in the property by imposing a real estate or brokerage commission on them. [266]

Q. (By Mr. Hildebrand): Now then, it says here “P.S.” in this letter that I refer to on the 3rd of April, “Holm bought the May property, about eighteen million, not far from his mill. I don’t know who sold it, I think he bought it direct. I don’t know what he paid.”

Do you recall asking Mr. Wilson to find out about what Holm did in connection with the May property?

A. What he paid for it?

Q. Yes.

A. I have no recollection, but I might have asked him, out of curiosity, to find out how timber was selling in the neighborhood.

Q. Yes. And did you make any investigation or did you know from your previous experience, or did you learn how timber was sold and the practices in connection with the selling of timber or timber tracts?

A. Oh, yes, I have had considerable experience.

(Testimony of Fred G. Stevenot.)

Q. And do you know, as a matter of fact, that the buyer ordinarily pays the commission?

A. No, I don't know that, I know the customary approach to it, but many timber deals are made where there is an independent arrangement, and in some instances a party sells timber for a timber owner and comes to the buyer and does not exact a commission, or attempt to.

Q. Well, can you name any specific instances [267] that you investigated or learned of where the seller paid the—the buyer paid the commission rather than the seller?

A. No, I made no investigation.

Q. You don't really know what the custom is of the business?

A. Oh, yes; I have had considerable experience in the matter myself.

Q. Do you know that the custom of the business is that the buyer——

A. The companies that I have headed have purchased a great deal of timber.

Q. You know that the custom of the business is that the buyer ordinarily pays the commission?

A. Well, that is probably so.

The Court: You mean the seller?

Mr. Hildebrand: I mean the seller, yes, pardon me, your Honor. That is just the reverse of what we are talking about.

A. I am not confused, I transformed that in my mind immediately.

Q. (By Mr. Hildebrand): You can't think of

(Testimony of Fred G. Stevenot.)

any instance where the buyer paid the commission?

A. No, I won't say right now.

Q. All right. And you knew that at the time that you were talking with Mr. Wilson in connection with these transactions?

A. That made me all the more insistent to hammer home the [268] idea that I would not pay a commission, or Coastal pay a commission.

Q. Now, as Trustee—you have had experience as a Trustee in quite a few matters before, have you not, Mr. Stevenot?

A. Well, not acting as Trustee, but matters in bankruptcy and on bondholders' committees—yes, I have had.

Q. And you were familiar with the duties of a Trustee, were you not?

A. Yes; I became instructed in this particular case.

Q. And as Trustee you knew it was your duty to represent all the various interests involved, the stockholders and creditors, and try to sell this property, if you could, in order to make everybody whole, if possible, isn't that right?

A. Well, the forepart of your question I would say that my insistence upon hammering home the idea to Mr. Wilson that I would not pay a commission was predicated upon that, that I wanted to preserve as much of the equities to the stockholders as possible, but remember, I was appointed in this matter primarily to secure a reorganization of the Company, a financial reorganization, a material re-

(Testimony of Fred G. Stevenot.)

organization of the Company, and I devoted my time up to the submission of the first plan of reorganization that was turned down by the R.F.C. to that work, and I refused anything that would cut across that or deny me that opportunity.

Q. Well, that plan failed completely, didn't it, the first plan? [269]

A. It didn't fail completely, no. So far as a plan of reorganization, we had one, but it was necessary for me to get the assent of the creditors. I have no particular control over that.

Q. And when they didn't assent, why, that was the end of the plan, is that right?

A. That particular plan. I may have developed another one.

Q. Then following this letter of the 3rd you recall receiving this letter of April 7th—I think we have these letters here some place.

The Court: They are in evidence, Mr. Hildebrand.

Mr. Hildebrand: This is it. This is labeled as Petitioner's Exhibit No. 9.

A. You don't need to read or argue about it.

Q. No. Did you receive that letter?

A. Yes, I received it.

Q. All right. Now in this letter Mr. Wilson states to you:

“Dear Mr. Stevenot:

“I have the following rather encouraging report to make to you. The Welsh Brothers, Elwood and Jeff, of Willits, are fine prospects for the Coastal

(Testimony of Fred G. Stevenot.)

timber and mill. I first met these gentlemen about 18 years ago when I was gold dredging in Oregon. They have a large stand of Ponderosa pine near John Bay. Some years ago they sold the tract, I am told, for [270] around two million. Recently they bought the Charles Howard," and so on, and describes that situation.

"The above is good news.

"So that you will be informed as to what I have been doing, I recite the following:

"I have negotiated with the following, but up to now no luck."

And then he lists a number of timber companies that he has contacted.

The last paragraph:

"Merely for your information.

"With kindest regards, I am

"Yours truly,

"Alex Wilson."

Under date of April 7th.

Do you recall that letter?

A. Yes, I do.

Q. Do you recall receiving that information from him? A. I received the letter.

Q. All right. Then following that on June the 9th do you recall receiving a letter of June the 9th, Exhibit No. 10? (Exhibiting document to witness.) Do you recall that letter? You read that, did you?

A. Yes, I received it and read it.

Q. He said to you: [271]

"Dear Mr. Stevenot:

(Testimony of Fred G. Stevenot.)

“You have asked me to give you a list of the companies or individuals to whom I have tried to sell the Coastal Plywood properties.”

Did you ask him for a list?

A. No, I did not. That is not true, that statement.

Q. That isn't true?

A. That is not true, I didn't tell him or advise him to sell the property.

Q. Did you write him correcting him where he sent you this statement on June 9th, saying that you had advised him to give you a list? Did you reply to this letter?

A. No. Mr. Wilson came in and he was a welcome visitor coming in and talking to me about it, because he was very active in the industry, but always did I rely upon the instruction that I had given him up to the early part of July, when the R.F.C. turned down the first plan of reorganization, that I would not sell the timber, that I did not intend to sell the property, Mr. Wilson understood that, and these letters that you are reading, finally culminated in my writing him one letter.

Q. Well, that was after he made the deal for you, wasn't it, that you wrote him the one letter?

A. No, the deal was not made. The deal was in jeopardy for months. [272]

Q. We will go into that in a minute. This letter here of June 9th, did he also say to you, “At present I am working with the J. J. Sugarman Company and have great hopes that they are going to

(Testimony of Fred G. Stevenot.)

submit a proposition to you. They are now planning on coming to San Francisco to conference with you." Did he tell you that? A. That is right.

Q. Had you ever had any dealings or conversations or contact with the J. J. Sugarman Company previous to that time? A. To what date?

Q. June 9, 1953. A. No, I had not.

Q. Was that the first that you heard of or knew of the J. J. Sugarman Company as being interested in this matter?

A. Well, I don't know from even reading the letter whether they were interested.

Q. Well, I mean this is the first you heard about them, isn't it?

A. Well, the first I recollect of hearing about the Sugarman Company.

Q. All right. "Others to whom I have submitted the Coastal properties to are"—and then he lists over a half a page of contacts here.

"In some cases I took the prospects to the property. I have in my files the correspondence with the above concerning [273] the deal. In addition I have submitted the deal to several individuals whom I shall not bother to mention herein.

"Yours truly,

"Alex Wilson."

Now in addition to writing you in this respect he also brought them into the office to discuss these matters with you at various times, didn't he?

A. Well, he would come in at times, he wouldn't discuss this as fully as you see there in the letter,

(Testimony of Fred G. Stevenot.)

but invariably I would bring up the situation to remind him that in spite of these letters and in spite of these contacts that the property up to a certain date in July was not for sale and that I would not pay a commission.

Q. Now, on June 21st, another letter——

A. I have no control over Mr. Wilson's persistency.

Q. This is Plaintiff's Exhibit No. 11. Do you recall receiving and reading this particular letter? This is Exhibit No. 11 (exhibiting document to witness). Do you recall reading that letter, do you, when it came in?

A. Well, I have got a very faint recollection of that letter, because he has written me so many letters telling me he had contacted this party and that party, that——

Q. This one is June the 21st, just a month before the Sugarman offer.

“Dear Mr. Stevenot: [274]

“I went today per schedule to the office of Mr. William Steinberg, who represents the Sugarman Company of Los Angeles and New York. The upshot was that Mr. Sugarman did not arrive. Mr. Steinberg informs me that after studying the deal with the Sugarman Company the Sugarman Company decided that they did not want the deal. Quite surprising to me after such assuring talk.”

Up to that time had you had any contact with the Sugarman's?

A. No. I don't wish to impeach these letters,

(Testimony of Fred G. Stevenot.)

but my recollection is not emphatic or firm enough to pass upon each one of these letters in relation to any particular party that he claimed to have contacted. I would have to check my files.

Q. Well, perhaps I can refresh your recollection on this next one:

“However, I immediately talked over the telephone to Mr. Eugene Brewer, President of U. S. Plywood Corporation, Shasta Division. Mr. Brewer, who I know and who is a very reliable man, states that he is sure his company will be interested. To-day he is telephoning to his New York office. I have left for Redding, California to see Mr. Brewer and will be in his office tomorrow.

“Hoping that the above will develop, I remain

“Yours truly,

“Alex Wilson.”

Do you recall discussing with him the possibility [275] of selling to the U. S. Plywood Corporation?

A. Not selling the timber, but if they would be interested in submitting a plan of reorganization. I recollect very well Mr. Wilson talking about U. S. Plywood.

Q. And do you recall saying to Mr. Wilson in that connection, “These are the people to see because they have got the money”?

A. Well, always on the assumption that he was following my instructions that he, if he brought anyone in, would see to it—that on a plan of reorganization he would be compensated on any deal

(Testimony of Fred G. Stevenot.)

that was made by the parties submitting the reorganization plan.

Q. In that connection you repeatedly told him to try to get his commission from the buyer, is that right?

A. No, I didn't say to try; no, I don't think we referred to that——

Q. And didn't he repeatedly say, "Well, that is a pretty hard thing to do, Mr. Stevenot"?

A. No.

Q. ——"but I will see what I can do"?

A. No. He did originally, but he did not repeat that. He acquiesced and as far as I knew he was following my instructions.

The Court: Mr. Stevenot, I am interested in what you mean by "plan of reorganization" when you talked about U. S. Plywood. Do you mean that U. S. Plywood would invest in the present company or that U. S. Plywood would purchase the whole [276] property at a price that would be a fair price so that the estate—that is, the stockholders and creditors and all would be protected?

A. That we would know what each particular division or segment of the company would receive, and I was particularly interested in so far as the stockholders were concerned to see that they got their money with a profit, if possible.

Q. Well, when you say that you were interested in the plan of reorganization in reference to U. S. Plywood, did you mean that would encompass U. S. Plywood taking over the whole property?

(Testimony of Fred G. Stevenot.)

A. Yes, that is possible, your Honor.

Q. Would it be an operating agreement?

A. Well, it might be. They might take it over.

Q. In other words, there were several alternatives that you had in mind?

A. Many of them.

Q. Yes, all right.

Q. (By Mr. Hildebrand): You didn't assume in that connection or in these other connections that Mr. Wilson would exercise and use his time and his talents for nothing, did you?

A. I would not expect him to, but, I didn't want him to get it at the expense of the stockholders, because they were at all times in a very precarious position.

Q. Well, this deal that finally eventuated pulled [277] the stockholders out of their precarious position, didn't it?

A. Well, we are hopeful that it will.

Q. Now then, under date of July 17th do you recall receiving and reading this letter, Petitioner's Exhibit No. 12 (Exhibiting document to the witness)?

Just if you recall it?

A. No, I am not as emphatic in that, in receiving that letter. I don't recall that.

Q. Well, you read the letters that Mr. Wilson wrote you as Trustee, did you not?

A. Yes. I will say that the mention of these various companies is familiar to me, and I do not question that Mr. Wilson talked to me.

(Testimony of Fred G. Stevenot.)

Q. And he wrote you as follows on the date of July 17th:

“Dear Mr. Stevenot:

“The following will bring you up to date in my attempts to sell the Coastal Plywood properties:

“1. Mr. G. C. Brewer, President of United States Plywood Company, has a crew of men going over the timber holdings. This group is headed by Harry Russell, Log Production Manager for U. S. Plywood.

“Within a few days Mr. Brewer will write us a letter stating his plans.”

Do you recall that now; do you?

A. Yes, but the point I make here is that——

Q. We are not asking you to argue the matter, Mr. Stevenot.

A. I understand, but I must explain my position. Can I explain it?

The Court: Certainly, explain your answer.

A. He has written me a number of letters, and finally it culminated in a situation that I had to recognize. It had seemed to be a build-up that he was representing me and that he was serving me and that he was interested in bringing someone in to purchase the property. So at that time, following the receipt of several of these letters, that included, why, I discussed it with Mr. Olson and Mr. Harrington, and told him of my concern over it, and as a result of a meeting a letter was prepared that I sent to Mr. Wilson.

Q. After he put over the Sugarman deal?

(Testimony of Fred G. Stevenot.)

A. Oh, no, he didn't put over, the Sugarman deal was not put over at that time.

Q. Well, after the first proposition came in on the Sugarman deal then you wrote the letter, didn't you?

A. Well, it may have been a coincidence, but the proposition that came in on the 22nd brought in by Mr. Steinberg was never consummated and never amounted to anything.

Q. Well, it was the follow-up of that that made the deal for Coastal Timber, wasn't it?

A. Well, there was also a period in there that the Sugarman people—that is, the J. J. Sugarman Company letter, and then [279] the Sugarman Lumber Company finally consummated the deal. But there was a period of a month or two that they completely dropped out of sight, that I heard nothing from anyone about it.

Q. But they made a proposition in that letter of the 22nd, the very day that you wrote the letter to Mr. Wilson, isn't that right?

A. No, that is the J. J. Sugarman Company, not the Sugarman Company.

Q. Well, they are the same people that got the timber, aren't they? A. Not exactly.

Q. Well, Mr. Margolis and Mr. Sugarman, they are all in the picture, aren't they?

A. Well, there were various changes in that, and what relationship they had finally in the matter that concluded the deal—because I recall that in the J. J. Sugarman Company offer there was a

(Testimony of Fred G. Stevenot.)

man by the name of Jamieson in it. I understood that he had a quarter interest in it with Mr. Sugarman, and he, between the time that the Sugarman people, the J. J. Sugarman group dropped out, he came in, he and his son, to see me, and as a result of that visit we had several conferences in an attempt to negotiate a deal, and Mr. Steinberg, at least I understood, was handling that for him.

Q. That was all after July 22nd, though, of 1953? [280] A. That is right.

Q. In this letter of July the 17th Mr. Wilson also stated to you:

“The Sugarman Company, represented in this company by Mr. William Steinberg, has again come back into the picture as possible buyers. Today Mr. Steinberg asked me to come to his office. He now states that within a few days he is going to hand me a proposal accompanied by a check.”

That was on the 17th that he wrote you to that effect.

Now, it was just a few days after that, on the 22nd, that Mr. Steinberg gave you this proposal, is that right?

A. It was not accompanied by a check.

Q. No, but it was a very definite proposal on the property?

A. No, it was not definite. It was rather just a statement that he would pay \$3,750,000 for the property, but I refused.

Mr. Hildebrand: We have that letter of the 22nd in evidence. What exhibit is that?

(Testimony of Fred G. Stevenot.)

Q. Here is the letter of July 22nd, Petitioner's Exhibit No. 3. You recall receiving this letter, do you not, on that date from Mr. William Steinberg?

A. Yes, I do, I recall.

Q. And was that letter delivered to you personally by Mr. Steinberg or how was it delivered?

A. It was delivered personally by Mr. Steinberg.

Q. And on the date it bears?

A. That is right. [281]

Q. It was on that same day that you wrote to Mr. Wilson the letter in evidence here in which for the first time in writing you tell him you are not going to pay him any commission, is that correct?

A. Well, that was a mere coincidence.

Q. Just a coincidence?

A. Just a coincidence.

Q. The fact that Mr. Steinberg here on behalf of the Sugarman interests, Mr. Steinberg being produced by Mr. Wilson, made an offer that the total purchase price of \$3,750,000 for all the net assets of Coastal Plywood was being offered—I think your Honor has this letter in mind. Has your Honor read this letter?

The Court: Yes.

Q. (By Mr. Hildebrand): The fact that you got that proposition on the same day had nothing to do with your writing this letter, Petitioner's Exhibit 14?

A. It had nothing whatsoever. I didn't know Mr. Steinberg was coming in or was to make the

(Testimony of Fred G. Stevenot.)

offer on that day. Several days previous, four or five days previous to that I had that conference in my attorney's office, and the letter was prepared and mailed——

Q. This letter that came from Steinberg, this Petitioner's Exhibit No. 3, do you have in mind or not this Paragraph 6:

“J. J. Sugarman Company, or its Successor in Interest, [282] shall not be responsible for any fees, costs or expenses by virtue of this transaction being called to their attention.”

A. Yes.

Q. You had that in mind?

A. No, I didn't have that in mind, but I remember that letter.

Q. You know that that was in their proposition?

A. Yes, that would be proper for them to put that in, a matter of precaution on their part.

Q. And the same day that you got that proposition with that in you wrote for the first time to Mr. Wilson in writing saying:

“Moreover, as I have previously advised you, neither I nor Coastal Plywood and Timber Company may be obligated for any commissions payable in connection with such a plan, and any such commissions must be paid by the investors for whom you act.”

You wrote that on that same day?

A. I wrote that letter on the same day, yes.

Q. When you already knew——

(Testimony of Fred G. Stevenot.)

A. It had no connection whatsoever with the Steinberg letter.

Q. When you already knew that these Sugarman people wouldn't pay a commission?

A. No, I didn't know that.

Q. You were perfectly willing to take the deal that Mr. Wilson had gotten for you and pay him nothing, is that right? [283]

A. I will revert to my original statement and understanding with Mr. Wilson, that I put him on record personally that I was not in favor and would not pay him a commission.

Q. I am not asking you that.

The Court: Just a moment. The question just propounded and the answer just given have elements of argument, and I don't want you to argue this case. If you stay with the facts I think we will get along better, because I don't want you to argue with Mr. Stevenot or Mr. Stevenot to argue with you.

But what I do want to know, Mr. Stevenot, is had you received the Steinberg letter by the time you had written the letter to Mr. Wilson? Were you aware of the Steinberg letter when you wrote the letter to Mr. Wilson?

A. No, the letter was composed several days before, your Honor.

Q. And when you prepared the letter to Wilson you were not aware of the Steinberg letter?

A. That is right.

(Testimony of Fred G. Stevenot.)

Q. (By Mr. Hildebrand): You say it is just a coincidence it was on the same date?

A. Just a coincidence.

Q. Well, as a matter of fact, in connection with the Steinberg letter, several days before that, on the 17th, Mr. Steinberg had come in to give you the substance of that letter?

A. Well he—there was another one came in a number of times [284] telling me what he was going to do and what the Sugarman would do, but there was always a wide disparity between what Mr. Steinberg would tell me and what I received from the Sugarman.

Q. Well, in any event, Mr. Steinberg was in a few days before the 22nd to tell you what the Sugarman were going to do?

A. Yes, he came in a number of times. I have people, your Honor, coming in and out for many months, for years.

Q. So that prior to writing this letter of July 22nd to Mr. Wilson you did know what the Sugarman proposition was?

A. No, I did not.

Q. Well, when he was in on the 17th didn't he tell you what the proposition was?

A. Well, Mr. Steinberg, with all due regard for him, telling me what was going to come to me and what actually came and what the Sugarman would do substantially, there was a wide disparity.

Q. Didn't he tell you the same thing in Para-

(Testimony of Fred G. Stevenot.)

graph 6 of this proposal that the Sugarman weren't going to pay any fees, costs or expenses?

A. No, Mr. Steinberg did not mention—he told me he was representing the Sugarman, and that he was setting up the deal for them, and that they were relying on him and that he had an understanding with Mr. Wilson.

Q. Well, you say that you consulted with your [285] attorney before writing this letter, that you consulted with Mr. Olson and Mr. Herrington. You had another attorney, Mr. Carr. Did you consult with Mr. Carr also?

A. No, I don't recollect that I did. As I went over to the other office quite frequently, we kept Mr. Carr informed, but I consulted with Mr. Olson, and Mr. Olson was busily engaged in the mechanics of doing the work, and I consulted with him many times. In this particular instance, though, the fact that I had received all those letters that seemed to be in a sense a build up there that he was putting himself in position to come in and claim in spite of my instructions to him, a commission, then I did sit down with Mr. Olson and Mr. Herrington to combat and put myself on record so that this very thing that has transpired here, your Honor, would not come up.

Q. You had also talked with Mr. Carr, hadn't you, about Mr. Wilson and whether or not Mr. Wilson had been referred to you by Mr. Carr, and various matters like that?

(Testimony of Fred G. Stevenot.)

A. No. Mr. Wilson came over and told me that he came from Mr. Carr's office.

Mr. Olson: Well, excuse me, that question is rather vague. It is in effect asking him what——

Mr. Hildebrand: Well, I will withdraw the question and put it this way:

Did you have any conversations with Mr. Carr about Mr. Wilson in this matter? [286]

A. Well no, I never had any conversation about Mr. Wilson in the matter with Mr. Carr.

Q. And did you know whether or not Mr. Wilson was also discussing what he was trying to do with Mr. Carr, your attorney?

A. No, Mr. Carr did not tell me so.

Q. Mr. Carr never discussed that with you?

A. No arrangement between Mr. Wilson and Mr. Carr were ever discussed by either Mr. Wilson or Mr. Carr with me.

Q. Now, Mr. Steinberg, he came in to see you some days before this proposition of the 22nd. Was Mr. Carr and Mr. Olson present with you when you talked with Mr. Steinberg about this Sugarman Lumber Company deal?

A. No, we were alone, Steinberg and myself.

Q. And did Mr. Carr at that time specifically say to you that he would not take care of Mr. Wilson or any other agent's commission in that particular transaction?

Mr. Olson: Mr. Carr, counsel?

Mr. Hildebrand: Yes.

Mr. Olson: Did Mr. Carr state——

(Testimony of Fred G. Stevenot.)

Mr. Hildebrand: No, did Mr. Steinberg state to you in the presence of Mr. Carr and Mr. Olson?

A. No, Mr. Carr did not discuss any of these Steinberg arrangements in regard to commission to be paid to Mr. Wilson with me.

Q. So that if Mr. Steinberg so testified he is in error in that connection? [287]

A. What is it?

Q. Your recollection in that connection is that you didn't have any such conversation with Mr. Steinberg?

A. That is right.

Q. Now, did you ever tell Mr. Wilson to bring in an offer of \$4,000,000 with substantial people and that you would be quite sure the Court would approve the deal?

A. What do you mean, a sale?

Q. Yes. A. No, I did not.

Q. Never made any such statement?

A. No such arrangement.

Q. Did you find out at any time in your discussions with your attorney, Mr. Sterling Carr, as to whether or not he had been talking with Mr. Wilson about the sale of these properties?

A. No, I had no discussion with him about it.

Q. At any time up to this date have you had any discussion with him about it?

A. Well, I wouldn't say that we had not discussed this matter that has developed here, yes.

Q. You have discussed this matter with Mr. Carr?

(Testimony of Fred G. Stevenot.)

A. When Mr. Carr was in my office, yes, it was a part of the topic of conversation, yes.

Q. And you have found out since, haven't you, [288] that Mr. Carr had also been discussing with Mr. Wilson about the sale of these properties?

A. No, he didn't tell me so.

Mr. Olson: I object, your Honor, I don't see the relevancy of any inquiry into any conversations that may have occurred after this Petition was filed.

The Court: These are conversations after?

Mr. Hildebrand: Well, I am just trying to get back to what happened before, and I'm just sort of tracing back——

The Court: Well, I will overrule the objection if the subsequent conversations relate back to prior conduct, but if they do not I will strike it, because subsequent conversations have nothing to do with the transaction at the time it was made, but if there is evidence of the transaction having taken place, why that is another matter.

Mr. Hildebrand: That is the purpose, your Honor.

The Witness: Will you state that question again, please?

Q. (By Mr. Hildebrand): Have you ascertained in your discussions with Mr. Carr as to whether he had any talk with Mr. Wilson about these deals before?

A. Prior to this case?

Q. Yes.

A. No, we never had any discussions.

Q. You never talked to Mr. Carr about it?

(Testimony of Fred G. Stevenot.)

A. He may have mentioned Mr. Wilson, but we [289] had no discussion, no arrangements.

Q. You told us a while ago that you found out some time along the line that Mr. Carr referred Mr. Wilson to you. When was that?

A. Why, Mr. Wilson came over and told me that he went over and talked to Mr. Carr about the sale of the property and Mr. Carr said, "You go and see Mr. Stevenot," which is a proper instruction.

Q. Didn't you ask your attorney, Mr. Carr, about Mr. Wilson and about that?

A. No, I didn't.

Mr. Carr. He sent him over and that is a common thing to do.

Q. You never even mentioned that to Mr. Carr?

A. No, as I recollect, we never referred to it. Mr. Wilson did not outline any program that Mr. Carr had instructed him to come over and submit to me.

Q. You don't know then whether or not Mr. Carr encouraged Mr. Wilson to go ahead and try to sell this property?

A. No, I don't know that.

Q. And you never talked to Mr. Carr in that connectoin to find that out?

A. I don't understand why I should. In my mind it never existed.

Q. (By the Court): Well, the point is, you [290] didn't? I don't want you to argue with coun-

(Testimony of Fred G. Stevenot.)

sel. Your point is that you didn't, did not have any such discussion?

A. No, I never had any such conversation. Mr. Carr always advised me on legal matters, along with Mr. Olson. Other than that he didn't inject himself.

Q. (By Mr. Hildebrand): Did Mr. Carr advise you in relation to this matter?

A. Not telling me I should sell the property or what I should do in regard to the development of a plan of reorganization. As I proceeded I also took into my confidence Mr. Olson and Mr. Carr, but there was never——

The Court: Well, now, just a moment. What do you mean by "this matter"?

Mr. Hildebrand: Well, I mean as to this particular claim here.

Mr. Olson: I will raise the same objection, your Honor. The question as to what Mr. Carr——

The Court: It all depends on when it took place.

Q. (By Mr. Hildebrand): Did he advise you before the filing of this Petition that Mr. Wilson was entitled to be paid? A. No.

Q. Or that he had sent Mr. Wilson to you to try to make a sale of these properties?

A. I think I answered that by saying that he did send him over to see me. [291]

Mr. Olson: Same objection to any conversations subsequent to the filing of the Petition.

Mr. Dudley: And it has been asked and answered.

The Court: Well, if you want to go into con-

(Testimony of Fred G. Stevenot.)

versations that may disclose prior conduct I will not foreclose it, but if you are going to try to establish liability by subsequent conversations other than to show prior conduct I will have to rule that the question is inadmissible.

Mr. Hildebrand: Well, just one final question on that proposition: Is it correct that you never had any discussion with Mr. Carr as to the relationship or the work to be done by Mr. Wilson prior to the time that this Petition was filed asking for a brokerage fee in this case?

A. That is right, I had no conversation with him about that specific subject.

Q. So that if there was some discussion between Mr. Carr, your attorney, and Mr. Wilson you didn't know anything about it?

A. You say if there were?

Q. Yes.

A. I know nothing personally about it.

Q. If Mr. Carr gave Mr. Wilson any assurances, as Mr. Wilson testified to, that you were an honorable person and that if he put the deal over he would be paid, you had nothing to do with those assurances?

A. No, Mr. Carr did not tell me anything of that sort. [292]

Q. You can't say that Mr. Carr did not give any such assurances?

A. It is obvious I can't say that.

Q. He was your attorney in this matter, wasn't he?

(Testimony of Fred G. Stevenot.)

The Court: Well, that is obvious too.

Q. (By Mr. Hildebrand): Following the letter of July 22nd from Mr. Steinberg did you then continue to deal with Mr. Steinberg and various representatives of the Sugarman group until the deal was finally closed for the sale of the assets of Coastal?

A. Well, I might answer by saying I never did deal with Mr. Steinberg. He came in purporting to represent the Sugarman and deliver something to me.

Q. Was he the first contact that you had with the Sugarman?

A. Yes, I believe that is true.

Q. Outside of the letters that Mr. Wilson had written you that we have introduced here in evidence. Then after that, so far as the purchasers or the buyers were concerned, was Mr. Holm the next party you heard about who was going to buy a substantial amount of the timber on the overall deal, or did you hear about Mr. Holm?

A. Well, Mr. Wilson told me that he was engaging Mr. Holm's attention to purchasing some of the timber in the Sugarman deal, but that had nothing to do with the plan of reorganization or anything that I had charge of. [293]

Q. Well, so far as the plan that you had charge of was concerned and the final sale to Sugarman Lumber Company, there have been various figures mentioned here, do you have in mind exactly what that final sale was for, how much?

(Testimony of Fred G. Stevenot.)

A. No, I do not.

Q. Do you have that in mind now? Do you know what the figure was?

A. The figure that we——

Q. That was finally agreed upon?

Mr. Olson: I might suggest, counsel——

Mr. Hildebrand: Maybe we can stipulate to that. What is the figure?

Mr. Olson: I don't have it here, but it is in the record in the Trustee's report on the confirmation of the second plan of reorganization.

Mr. Hildebrand: Well, can we agree on what that is?

A. I can answer that, your Honor. I thought he was referring to the subsequent sales in carrying out the Sugarman plan.

Mr. Hildebrand: Oh, no.

The Court: He is talking about the transaction between the Trustee and——

A. Oh, \$4,352,000, something like that.

Mr. Hildebrand: That was the amount.

The Court: \$4,352,000?

Mr. Olson: He is referring to the gross price.

A. That is the gross price.

Mr. Hildebrand: That is the gross price.

Mr. McMurchie: You don't know what the adjusted price is?

Mr. Olson: No.

The Court: Well, you can stipulate on that.

Mr. Hildebrand: We can stipulate on that, I

(Testimony of Fred G. Stevenot.)

believe, except I just wanted to be sure I didn't forget to get it in the record.

The Court: \$4,352,000 is the gross figure.

Mr. Hildebrand: Gross price, gross figure.

Mr. McMurchie: I think it is \$4,452,000, your Honor.

Mr. Olson: Well, actually the gross figure is \$4,302,000 after giving credit to the accounts receivable which the Trustee retained, and the inventory adjustment brought it down to somewhere around \$4,100,000, I don't have the exact—

A. One hundred and thirty-two.

Mr. Olson: \$132,000?

A. \$4,132,000.

The Court: I will put down then that the net sale was \$4,132,000, subject to correction by counsel after examining the record, is that correct?

The Witness: Yes.

Mr. Hildebrand: Yes.

Q. Now, that sale was very beneficial, was it not, [295] to the stockholders and the creditors of the company? A. What?

Q. That sale was beneficial to the stockholders and creditors?

A. It was the best we could develop, yes.

Q. And I have here the statement that your attorney, one of your attorneys, Mr. Herrington—it is just an excerpt from the transcript that Mr. Herrington stated to the Court as to the benefit of this proposition to the estate, and do you recall

(Testimony of Fred G. Stevenot.)

the statement that Mr. Herrington made in that connection?

Mr. Olson: We will stipulate that the statement was made.

Mr. Hildebrand: Yes, and I would like, if I might, read this to your Honor as the statement of the attorney for the Trustee on the benefit of this——

Mr. Olson: I would like to question, however, the relevancy of this particular statement of the attorney for the Trustee and object to it on the ground it is irrelevant.

The Court: Just a moment, please.

Mr. Olson: If your Honor please, I would like to object to the introduction of any statement——

The Court: What materiality has it?

Mr. Hildebrand: The theory is this, your Honor, the benefit to the estate, and these cases all along go off a lot on——

The Court: On the equities?

Mr. Hildebrand: On the equities and the benefit to the estate in putting over the deal, the work [296] that Mr. Wilson did in getting these people together.

The Court: Well, I think, without conceding the last part, that is, agreeing that that is so, there may be some argument about the effectiveness of the work that Wilson did, but that the proposition is beneficial to the estate, that is, the sale, can be assumed from the record itself without reading any arguments about it. I don't think any parties here

(Testimony of Fred G. Stevenot.)

make any contest that it was not a beneficial sale. You don't make that point?

Mr. Olson: Oh, no, your Honor.

The Court: You are willing to stipulate that it was a beneficial transaction to the estate?

Mr. Olson: I will stipulate, your Honor, that the second plan of reorganization which encompassed this sale was most beneficial to the estate.

Mr. Hildebrand: We will so stipulate, your Honor. That will save us a little time.

There are a couple of other matters—I don't think these are in evidence (Referring to documents).

I will show you a telegram here dated June 24, 1953 addressed to G. A. Stevenot, and ask you if you recall receiving that from Mr. Wilson?

Mr. Olson: If your Honor please, for the record I would like to make the same objection that I made to all the other correspondence, that it is irrelevant, that it relates to the alleged efforts of Mr. Wilson which were prior to and clearly [297] unrelated to the transaction with the Sugarman Company.

The Court: I will overrule the objection, and the record is made, and I will take the same position on this. Now, Mr. Stevenot, would you answer the question? Do you recollect having received that telegram?

A. Yes.

Mr. Hildebrand: And you recall this other one, too of the 26th here?

(Testimony of Fred G. Stevenot.)

A. I had no control over Mr. Wilson.

Q. I am not asking you that.

A. I received it.

Q. You received it?

The Court: Now you want to put these in evidence?

Mr. Hildebrand: I would like to put these in evidence.

The Court: Well, subject to the objection they will be put into evidence. The early one will have the next Petitioner's number.

The Clerk: The telegram of June the 24th will be Petitioner's 16, and the one of June 26th will be Petitioner's 17.

(The documents referred to were marked
Petitioner's Exhibits No. 16 and 17.)

Mr. Hildebrand: I would like to read these, your Honor, if I may.

The Court: You may.

Mr. Hildebrand: "June 24. G. A. Stevenot, 920 Bank of [298] America Building, Montgomery and California Streets, San Francisco.

"Will you please send immediately cruise and last operating report to Gene C. Brewer, President of U. S. Plywood Corporation, Box L-688, Redding, California. They are greatly interested in Coastal Plywood properties and want data for immediate conference in New York.

"Alex E. Wilson, Oroville Inn, Oroville."

The other dated June 26, addressed to the same address:

(Testimony of Fred G. Stevenot.)

"Coming home tonight. See you tomorrow stop. U. S. Plywood enthused about deal stop. Regards.

"Alex E. Wilson."

Mr. Hildebrand: Would this be a convenient time for your Honor to adjourn, or would your Honor prefer——

The Court: Well, of course, I want to go as far as I can on this matter. I want to know what you gentlemen expect on further time, because I have a jury trial going which I am recessing this afternoon until Friday.

Mr. Hildebrand: Until Friday?

The Court: Yes, and I want to know how much longer you are going to take, both of you, so I can——

Mr. Hildebrand: Well, I think we are almost through, your Honor. I might have a few more questions here after lunch, [299] but I wouldn't be very long, just a few minutes.

(Thereupon after discussion as to probable length of time required to complete the case, the further hearing of this matter was continued until 1:30 p.m. this date.) [300]

Afternoon Session, Monday, August 2, 1954

1:30 P.M.

FRED G. STEVENOT

resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Hildebrand): Mr. Stevenot, I no-

(Testimony of Fred G. Stevenot.)

tice in the affidavit that you filed in this matter that you say in Paragraph 8:

“Said offer presented to affiant by William Steinberg was not acceptable to affiant; that commencing in November 1953 affiant negotiated with N. N. Sugarman and Barney Margolis and their attorney Nathan M. Dicker concerning a possible offer to purchase assets of the creditor. Said negotiations continued over a period of several weeks and culminated in offer by Sugarman Lumber Company of Los Angeles, California to purchase all of the assets of the debtor except cash, accounts receivable and certain rights to recover property taxes. The said offer was dated December 12, 1953, and is attached to and constitutes a part of the second plan of reorganization of the debtor filed by affiant herein on December 21, 1953.”

Now, that statement in your affidavit, I take it, is correct?

A. It is correct.

Q. And then the Sugarman Lumber Company in this offer that you referred to, and this is from the files, Exhibit A in these files—— [301]

Mr. Olson: May I see it, counsel?

Mr. Hildebrand: This is attached to your reorganization plan. (Exhibiting document to counsel.)

The Sugarman Lumber Company signed on this offer, “N. N. Sugarman, President, by Barney Margolis, Secretary,” is that correct?

A. That is correct.

(Testimony of Fred G. Stevenot.)

Q. And how much money—you spoke this morning of some \$4,132,000 as the amount of the deal. How much money of that has already been paid?

A. How much has been paid?

Q. Yes.

A. Well, the assumption of the mortgage part of the Sugarman Lumber Company and the payment of the accrued interest, and a hundred thousand dollars to the note holders.

Q. And how much is still to be paid?

A. Still to be paid?

Q. Yes, sir.

A. Well, I would have to figure that out.

Q. It is around a million——

A. It is the amount paid by the Hollow Tree Lumber Company for the mill and for the timber and the deposits that were paid, the deposits on the Holm timber—I think as near as I can recollect now, I wouldn't know exactly what that figure is——

Mr. Olson: There is an element of accrued interest, counsel, [302] but we will stipulate, however, that it is \$2,130,000 plus accrued interest.

Mr. Hildebrand: So stipulated.

The Court: That remains to be paid?

Mr. Olson: Remains to be paid over a period of 15 years.

Q. (By Mr. Hildebrand): And how is that and when is that to be paid approximately?

A. Over a period of 10 years.

(Testimony of Fred G. Stevenot.)

Q. And when are the payments to be made and in what amounts?

A. Well, they will start—there are five notes and they will start after the repayment of the mortgage of \$2,000,000.

Q. And when is that to be paid?

A. That is to be paid in 10 years time.

Q. And there is a hundred thousand now in the account being held for the stockholders?

A. No, the hundred thousand dollars has been distributed to the stockholders.

Q. It has been distributed?

A. There is a little over \$200,000 yet due the stockholders made in advances and loans to the company.

Q. I see. Now, so far as any resale of the property was concerned over and above this \$4,132,000, were you familiar with that, or interested in the details of that?

A. No, I am not familiar with it.

Q. And if there was a resale of some 6½ or 7 million dollars [303] you are not familiar with the details?

A. No, and I don't understand—

Q. And whatever was done in that connection was done by the Sugarman people in other dealings that you didn't have anything to do with?

A. That is right.

Q. You recall, however, that Mr. Wilson discussed with you some time after this sale had taken

(Testimony of Fred G. Stevenot.)

place that he was to get \$25,000 for helping in the resale of some of this timber?

A. No, I understood from Mr. Wilson and also from Mr. Steinberg that he was to get \$25,000 from Mr. Steinberg, whatever Mr. Steinberg would receive from the Sugarman Lumber Company Mr. Wilson was to get \$25,000.

Q. And that was in connection with some \$2,000,000 that the Sugarmans were going to make out of the resale of the timber, wasn't it?

A. No, I don't know anything about that, no.

Q. Well, do you know now that there is a deal like that put through for the resale with about a \$2,000,000 profit?

A. No, I don't. I hear that there is a resale profit involved, but it is hearsay on my part.

Q. But as to what Mr. Wilson or Mr. Steinberg or anybody else did in connection with that you are not familiar with the details?

A. No, I am not.

Q. Could you give us approximately the amount [304] of personal property that there was in this whole transaction?

A. Personal property?

Mr. Olson: What do you mean by personal property, counsel?

Q. (By Mr. Hildebrand): Well, could you put a valuation on that? I mean within a hundred thousand dollars?

A. The timber and the mill and everything?

Q. Yes.

A. Well, that depends on what you would figure

(Testimony of Fred G. Stevenot.)

the value of the timber. Before there was a sale you would have no way of determining that.

The Court: Not the timber, he is talking about the personal property. That would be the lumber, logs, machinery?

A. I understand.

Q. Do you have any idea how the values were separated at the time of the sale?

A. Yes. At the time of the sale I would say we had about \$250,000 worth of equipment, and the lumber and the logs on hand probably would run about—at the time of the sale, about seven hundred and fifty or eight hundred thousand dollars. There was roughly about a million dollars.

Mr. Hildebrand: In personal property?

A. Of course we estimated that before the lumber was graded and the logs scaled after we had taken out the \$250,000 we were allowed to deduct.

Mr. Hildebrand: I think that is all at this time, [305] Your Honor, and with that we rest.

The Court: Now then you want Mr. Stevenot to remain on the stand?

Mr. Olson: I believe so, your Honor. I intended to call Mr. Wilson, but it is immaterial in which order——

The Court: Well, it is up to you.

Mr. Olson: I will question Mr. Stevenot first.

Direct Examination

Q. (By Mr. Olson): How long have you served

(Testimony of Fred G. Stevenot.)

as a Trustee of Coastal Plywood & Timber Company, Mr. Stevenot?

A. Since November of 1951, approximately 21½ years.

Q. By whom were you appointed Trustee?

A. When?

Q. By whom were you appointed Trustee?

A. Judge Lemmon.

Q. Pardon me?

A. Judge Lemmon, in this court.

Q. Do you have any interest in Coastal Plywood & Timber Company other than in your capacity as Trustee appointed by the Court?

A. No, I do not.

Q. Have you ever had any such interest in Coastal Plywood & Timber Company?

A. No, I have not.

Q. Do you hold any claim against Coastal Plywood & Timber Company [306] or own any shares of stock in that company? A. No.

Q. You filed an affidavit in opposition to Mr. Wilson's claim for real estate commission. Are all the statements made by you in that affidavit true and correct? A. They are.

Q. Did you as Trustee sell certain timber contracts of the debtor in 1952, Mr. Stevenot?

A. Yes, I did.

Q. To whom did you sell those contracts?

A. I sold them to Clarence Nielson and his wife Aimee Nielson.

Q. And did Mr. Nielson submit a written offer

(Testimony of Fred G. Stevenot.)

to purchase these contracts? A. He did.

Q. I will show you Petitioner's Exhibit 1 introduced in evidence and ask you whether you can identify that exhibit. A. Yes, I do.

Q. Was that letter received by you?

A. Yes, it was.

Q. And does that letter contain an offer from Mr. Nielson to purchase the timber cutting contracts? A. It does.

Q. Did you present that offer to the Court for approval? A. I did.

Q. Did you present that particular offer? [307]

A. No, not this offer of the 19th. No, this was never consummated. Mr. Nielson failed to effectuate the changes in the contract. That is, I should add, with the owners of the timber.

Q. And did you subsequently receive another offer from Mr. Nielson? A. Yes, I did.

Q. I will show you what purports to be a duplicate of a letter of October 11, 1952 from Clarence L. Nielson and Aimee K. Nielson, addressed to you as Trustee. Will you look at that document and tell me whether you can identify that?

A. Yes, I can identify it.

Q. Did you receive this from Clarence L. Nielson and Aimee K. Nielson? A. I did.

Q. And does that letter constitute the subsequent offer which you received to purchase those cutting contracts? A. That is right.

Q. And did you present that offer to the Court,

(Testimony of Fred G. Stevenot.)

petitioning the Court for authority to make the sale? A. I did.

Q. And in your petition for that authority did you disclose that \$5000 was to be paid to Mr. Wilson out of the proceeds of the sale?

A. Yes sir, I did.

Q. Were you authorized by the Court to proceed with that sale [308] to Mr. and Mrs. Nielson?

A. I was.

Q. Now, when you received that offer, Mr. Stevenot, from Mr. and Mrs. Nielson, did you have any conversation with Mr. Nielson and/or Mr. Wilson?

A. Yes, I did, the day he brought it in.

Q. Where was that?

A. In my office.

Q. Would you tell us who was present at that time?

A. Well, Mr. Nielson was present and his wife and I think he had three of his children there; Mr. Wilson was present, you were present, Mr. Olson, and myself.

Q. Will you tell us what was said at this meeting and by whom?

A. Well, immediately I called his attention to the fact that his offer contained an item of \$5000 commission to be paid to Wilson, and I protested it saying that I wanted a hundred thousand net for the property, for the cutting contracts.

Mr. Nielson reacted by telling me that he would only pay a hundred thousand dollars and he insisted that \$5000 of it be paid to Mr. Wilson.

(Testimony of Fred G. Stevenot.)

We had considerable discussion over the matter and did not reach a conclusion, and Mr. Nielson left my office.

I tried at that time to get Mr. Nielson to eliminate the question of the commission and pay me the hundred thousand [309] dollars. He refused. I repeated that several times.

Q. When did you accept this offer?

A. Well, I believe it was the same day. After he left the office I consulted with you and also gave some time, some thought after lunch, and later in the afternoon, owing to the fact that—I might also add that Mr. Nielson was greatly concerned over the time element and he wanted me immediately to present it to the Court and he was not in favor, in addition, to the question of eliminating the matter of the commission. He said time was the essence of the matter and he wanted me to accept it then and there.

Mr. Olson: I will offer——

A. (Continuing): That afternoon—why, having decided that the \$95,000 was a fair price and I was confronted by the same situation that Mr. Nielson was as to the time, the contracts would run out in 1956 and we wouldn't have time to get that timber off and probably engage in a protracted lawsuit with the owners, so I decided to accept his offer in toto.

Mr. Olson: I will offer this document in evidence as Trustee's Exhibit next in order, your Honor.

(Testimony of Fred G. Stevenot.)

The Court: All right, Trustee's Exhibit next in order.

(The document referred to was marked Trustee's Exhibit B.)

Q. (By Mr. Olson): Mr. Stevenot, did you at any time tell Mr. Alex Wilson that you wanted to sell these contracts in order to raise money for the purchase of equipment? [310]

A. Oh, certainly not.

Q. Did you need money for the purchase of equipment at that time?

A. No. I had arrangements at the bank for our current needs. I had a credit of around \$600,000, I think actually \$600,000, and the purchase of equipment—all the new equipment that was purchased under sales contract, that the supplier would bring to the bank, to the Bank of America, and the bank would take them over.

I had no need for a certain sum of money to be derived from the cutting contract.

Q. During the period from July to October 1952 were you, as the Trustee, endeavoring to sell any of the other assets of the debtor? A. No.

Q. Were you endeavoring to develop a plan of reorganization of any kind?

A. Right up to the time the RFC refused to give its assent to the reorganization plan, the first plan of reorganization I was striving to effect a plan of reorganization.

Q. What type of plan were you trying to develop?

(Testimony of Fred G. Stevenot.)

A. Well, a plan that would preserve the assets of the company and include the participation of the equity holders in whatever corporation was set up.

Q. Did you at any time, Mr. Stevenot, ask or authorize Mr. [311] Wilson to sell any of the properties of the debtor? A. I did not.

Q. After these cutting contracts were sold to Mr. and Mrs. Nielson did you have any conversation with Mr. Alex Wilson?

A. Yes. He came in regularly to the office quite often, and——

Q. Was anyone else present?

A. No, invariably I was alone with Mr. Wilson.

Q. What was said by you and Mr. Wilson at these meetings?

A. Well, he was anxious to find someone to bring in—as I understood, following my instructions to him, a plan of reorganization.

Q. Was anything else said by either of you in the course of these conversations?

A. Well, I repeated undoubtedly at that moment as well, and as he often remarked, that he understood my position, and I insisted on him representing the proposers or the people who were interested in the reorganization.

Q. What if anything did Mr. Wilson say to that?

A. Well, he acknowledged that he understood it. In other words, he did not protest it.

Q. Did Mr. Wilson at any time ask you to employ him as a broker? A. No, he did not.

(Testimony of Fred G. Stevenot.)

Q. Did you at any time remind Mr. Wilson of your statements [312] with respect to commissions?

A. Oh, I repeatedly, and particularly upon receipt of these letters, as he would come in I would in a general way refer to the fact that I was not interested in the sale of the property, whenever that discussion came up.

Q. Where was that? A. In my office.

Q. Was anyone else present at that time?

A. No, I was alone in all of these meetings.

Q. And did Mr. Wilson say anything on these occasions?

A. Well, he would understand it. In other words, he would not protest it and gave me to understand that he understood.

Q. Did you invite Mr. Wilson to come to your office on these occasions he came there?

A. No, I did not. He was welcome to come to my office but I did not invite him.

Q. Now, in June of 1953, Mr. Stevenot, you filed in Court here your first plan of reorganization, did you not? A. I did.

Q. Did this plan contemplate the sale of any assets of the debtor? A. No.

Q. Was this plan ever submitted to the stockholders for a vote?

A. No, it was not. [313]

Q. Can you tell us why it was not?

A. Well, I—appreciating that I would have to have the consent—it was necessary to secure the consent of the RFC and the Bank of America I sub-

(Testimony of Fred G. Stevenot.)

mitted the first plan of reorganization to the Bank and to the RFC. The Bank evidenced some interest in going along, but I received a letter from Mr. Craven, the Administrator of the RFC, stating that they would not go along with it and notifying me that they were taking steps to foreclose.

Q. When did the RFC notify you that they were going to take steps to foreclose?

A. I believe it was on the 3rd of July the letter was dated.

Q. Did you engage in any negotiations with the RFC after that date with regard to that plan?

A. Yes, for several weeks trying to get them to change their position.

Q. When did you first determine to sell the remaining assets of the debtor, Mr. Stevenot?

A. Well, when the RFC notified me and I discussed it with them on the telephone that they had employed Mr. Clark, an Attorney in San Francisco, to prepare a petition for foreclosure, why, I realized then that there was little or no chance to reorganize the company or prepare additional plan of reorganization, and then it occurred to me that it would be necessary probably to sell the property as a unit, including the mill and the timber and all the assets.

Q. I will show you Petitioner's Exhibit 14 and ask you whether you can identify that document?

A. Yes, I do. I addressed this letter to Mr. Wilson.

Q. And did you send that letter to Mr. Wilson?

A. I did.

(Testimony of Fred G. Stevenot.)

Q. That letter, if I may refer to it for just a moment, Mr. Stevenot, states in part that you will receive and consider any proposals which he might desire to submit on behalf of his clients, and it goes on to state: "Moreover, as I have previously advised you, neither I nor Coastal Plywood & Timber Company may be obligated for any commissions payable in connection with such a plan, and any such commissions must be paid by the investors for whom you act."

Now, will you state to the Court why you sent that letter to Mr. Wilson?

A. Well, I had received a number of letters from Mr. Wilson and it occurred to me that possibly there was what I might call a build up that he was acting as my agent, from the wording of his letters, and I was concerned over it, and I went to your office and discussed it with you some days prior to the sending of this letter to him. I talked to you and to Mr. Herrington of your firm and the letter was prepared, the substance of the letter was prepared by the three of us in discussion, and I took and addressed the letter to Mr. Wilson.

Q. When was the substance of the letter prepared? [315]

A. I would say four or five days before it went out.

The Court: July 22 is the date.

Mr. Olson: Yes.

Now, does that letter, Mr. Stevenot, state any-

(Testimony of Fred G. Stevenot.)

thing which you had not previously told Mr. Wilson verbally?

A. No, it does not. I repeatedly stated the substance of this letter to Mr. Wilson for considerable time before sending this letter.

Q. Did Mr. Sterling Carr at any time tell you that he had discussed this letter with Mr. Wilson?

A. No, he did not.

Q. Did Mr. Wilson at any time acknowledge to you that he had received this letter?

A. Yes, he did.

Q. And will you state approximately when he so acknowledged it?

A. Well, I wouldn't say the date, it was shortly after the return of one of his trips after this letter.

Q. Where did that take place?

A. Pardon me?

Q. Where did that take place?

A. In my office. He acknowledged receiving it.

Q. Was anyone else present? A. No.

Q. Did Mr. Wilson object to that letter when he acknowledged [316] receipt of it?

A. He did not.

Q. Did you ever write any other letter to Mr. Wilson? A. No, I did not.

Q. You received an offer from Mr. Steinberg on behalf of J. J. Sugarman and Co. in July of 1953, is that right? A. That is right.

Q. Is this the offer which you received (Exhibiting document to the witness)?

Mr. Hildebrand: Is that the letter of July 22?

(Testimony of Fred G. Stevenot.)

Mr. Olson: July 22 to Mr. Steinberg.

A. Yes, it is.

Q. That is Exhibit 3, is it not?

A. That is what?

Q. That is marked Petitioner's Exhibit 3, is it not? A. Yes.

Q. Now, did you receive this offer before or after your letter of July 22 to Mr. Wilson had been prepared in substance?

A. No, my letter to Mr. Wilson was prepared prior to my receiving this letter.

Q. Now, when you prepared your letter to Mr. Wilson in substance, did you know that this offer was coming? A. I did not.

Q. Did you accept this offer from Mr. Steinberg? A. No; I did not. [317]

Q. Did you have any conversation with Mr. Alex Wilson after you received this offer?

A. Yes, I believe on the same day I received it he came into my office.

Q. Anyone else present?

A. No, just Mr. Wilson and myself.

Q. And what was said and by whom at this meeting?

A. Well, we had a general discussion and I recall that as I always did, I never failed to remind him that I was not paying a commission, he was not representing me, and at that time he told me that he had brought the name of Sugarman to Mr. Steinberg and that Mr. Steinberg was going to take care of him.

(Testimony of Fred G. Stevenot.)

Q. Did he indicate in what manner?

A. No, he didn't. He just said that he brought it and Mr. Steinberg—that they had discussed some arrangement. I don't recall that he told me the exact figures or just the nature of the agreement, except that he was looking to—I gathered and understood that he was looking to Mr. Steinberg for his compensation.

Q. Did you receive any other offer of any kind from Mr. Steinberg?

A. No. This is the only one I received.

Q. Did you furnish any financial statements or other information concerning the debtor to Mr. Wilson?

A. Oh yes, like I did all others, I furnished at the request [318] of people interested for two previous years, supplied them with information, maps and reports.

Q. Now, to whom did you as Trustee eventually sell the assets of the debtor, Mr. Stevenot?

A. I sold them to Sugarman Lumber Company.

Q. And do you recall when you first entered into negotiations with Sugarman Lumber Company?

A. Well, I think probably it was—oh, some time in October, I believe.

Q. Of what year? A. 1953.

Q. And how long did these negotiations continue? A. For several weeks.

Q. Did Mr. Alex Wilson participate in these negotiations? A. He did not.

(Testimony of Fred G. Stevenot.)

Q. Did Mr. Steinberg participate in those negotiations? A. He did not.

Q. I will show you a set of four documents, Mr. Stevenot, purporting to be signed by officers of Sugarman Lumber Company, dated December 12, 1953, December 14, 1953, January 11, 1954, and February 1, 1954. Can you identify those documents?

A. Yes; those are the offers to purchase that came from the Sugarman Lumber Company after negotiations with Mr. Nate Sugarman and Mr. Barney Margolis.

Q. Did they constitute the offer that you received from [319] Sugarman Lumber Company to buy the assets?

A. To make up the second plan of reorganization.

Q. Was this offer included as a part of your second plan of reorganization that you filed with this Court? A. Yes.

Q. And do those letters set forth the terms of the sale of assets to Sugarman Lumber Company in your plan? A. Yes, that is right.

Mr. Olson: I will offer those in evidence, your Honor as Trustee's next in order.

The Court: Do you want them marked as one exhibit?

Mr. Olson: I believe so. They constitute one exhibit.

The Court: They will be admitted as Trustee's Exhibit C.

(Testimony of Fred G. Stevenot.)

(The documents referred to were marked Trustee's Exhibit C.)

Q. (By Mr. Olson): Mr. Stevenot, did you at any time authorize Mr. Alex E. Wilson to represent or act for you in any capacity?

A. No, I did not.

Q. Did you at any time authorize him to represent or act for the debtor in any capacity?

A. No.

Q. Did you at any time authorize or request Mr. Wilson to sell any assets of the debtor? Did you hear me? My question was, did you——

A. Well, you are not including the cutting contracts? [320]

Q. Pardon me—yes, I am asking you if you at any time authorized or requested Mr. Wilson to sell any of the assets of Coastal Plywood Timber Co.?

A. I say you are including the cutting contracts?

Q. I am including the cutting contracts.

A. No, I did not.

Q. Did you at any time authorize Mr. Sterling Carr to employ Mr. Wilson or any other broker to sell any of the assets of the debtor?

A. No, I certainly did not.

Q. Did you at any time authorize Mr. Carr to request Mr. Wilson or any other broker to sell any assets of the debtor? A. No.

Q. Did Mr. Carr at any time advise you that he had spoken to Mr. Wilson with regard to the sale of any assets of the debtor?

A. No, not that I recall.

(Testimony of Fred G. Stevenot.)

Q. Did Mr. Wilson at any time advise you that he had spoken to Mr. Carr or anyone else with regard to selling assets of the debtor?

A. Well, the only reference, he came to see me one day and he said that he had talked with Mr. Carr about Coastal and the sale of the assets, and Mr. Carr, according to Mr. Wilson's statement, had told him, "You have to see Mr. Stevenot."

Q. Was this in reference to the cutting contracts? A. No, this was later on. [321]

Q. Did Mr. Wilson at any time advise you that Mr. Sterling Carr had made any statement to him that Mr. Wilson would be paid any compensation by the debtor? A. No, he did not.

Q. Did you at any time state to Mr. Wilson that you or the debtor would pay him a commission or any other compensation in connection with selling the assets of the company to Sugarman Lumber Company? A. No, I did not.

Q. Now, did Mr. Wilson at any time prior to the close of the sale to Sugarman Lumber Company state to you that he expected to receive a commission from the debtor? A. No, he did not.

Q. When did he first indicate to you that he expected to receive compensation from the debtor?

A. Well, in the latter part of May, I think about May the 20th, I was having lunch at the Clift Hotel and Mr. Wilson approached my table to tell me he had decided—probably before that—just strike that.

Will you repeat the question again?

Q. Yes. The question was this: When did Mr.

(Testimony of Fred G. Stevenot.)

Wilson first indicate to you that he expected to receive compensation from the debtor?

A. Well, I was true in my statement; on the 20th of May.

Q. (By the Court): Of what year? [322]

Mr. Olson: And when was this?

A. In 1954. I was having lunch at the Clift Hotel and he approached my table to tell me that he had discussed with his attorney the matter of his having the right to claim a commission on the sale of the assets of the debtor company to Sugarman Lumber Company, and immediately I asked him, "This in spite of the fact I have repeatedly told you that neither I nor the debtor company would pay you a commission, and that I had put you on written notice?"

He said, "Oh yes, I will acknowledge all of that, but in a matter of a reorganization where the Trustee is concerned there are cases that permit me to appeal to the Court for compensation."

Q. Was anyone else present?

A. My Secretary, Miss Christenson was present.

Q. Prior to the conversation of May 20th did you have any indication from any source whatsoever that Mr. Wilson expected to recover compensation from the debtor? A. No.

Q. Do you recall a court hearing before the United States District Judge Murphy in San Francisco on April 13, 14 and 15 of this year?

A. Yes, I do.

Q. That involved a petition to set aside the order

(Testimony of Fred G. Stevenot.)

confirming the second plan of reorganization, did it not? [323] A. Yes.

Q. Did you have any conversation with Mr. Alex Wilson at this hearing?

A. Yes; in the closing days—I think the case ran about three days, and it was toward the end, probably the last day, I am not sure of that, at a recess, why, Mr. Wilson approached me and he was greatly dejected, and I assumed it was because of the fact that Mr. Steinberg had been a party to the question of setting aside the second plan of reorganization and substituting a new plan, and Mr. Wilson, as I recall, stated to me, “Where does this leave me?” And, in words to that effect, “This washes me out.” He had no claim—his claim against Steinberg would be valueless unless Steinberg could preserve his connection with the Sugarman.

And then he asked me if I could learn just what Steinberg was getting out of this from the Sugarman, and I told him I would try.

So I walked over to Mr. Dicker, attorney for the Sugarman people, and asked him and he told me that there was nothing definite with Steinberg, but they had figured in a general way, an understanding with Mr. Steinberg, that they would pay him a finder’s fee based upon a percentage of their profits growing out of this transaction.

I came back and reported that to Mr. Wilson.

Q. Was anyone else present during this conversation with Mr. [324] Wilson?

(Testimony of Fred G. Stevenot.)

A. Well, there were people in the court room, but they were not close by.

Q. Anyone in hearing distance to your knowledge? A. No, no.

Q. Now, when you presented your second plan of reorganization to the Court, Mr. Stevenot, did you advise the Court, either in that plan at any of the hearings or in any other way that a commission might be payable on the sale to the Sugarman Lumber Company contemplated on that plan?

A. No, I did not.

Q. And in any of your negotiations with stockholders or meetings with stockholders and creditors in connection with their vote on the plan did you at any time indicate to them that such a commission might be payable?

A. No. There was no necessity.

Q. Why do you say there was no necessity?

A. Well, in the first place I had repeatedly instructed Mr. Wilson, I had written to him, and he made no demand on me and did not suggest in any way that he was entitled to one and he knew that a plan was being formulated to be presented to the Court.

Q. To your knowledge prior to the filing of Mr. Wilson's petition that we are now hearing did anyone ever indicate to the Court or to the creditors or stockholders that a commission [325] or other compensation might be payable on the sale to the Sugarman Lumber Company?

A. No, not that I know of.

(Testimony of Fred G. Stevenot.)

Mr. Olson: I don't believe I have any further question, your Honor.

The Court: All right. Do you have any cross examination at this time?

Mr. Hildebrand: Just a little, your Honor.

The Court: All right.

Cross Examination

Q. (By Mr. Hildebrand): Mr. Stevenot, in this conversation at the Clift Hotel that you testified to with Mr. Wilson, did he discuss with you at that time this letter that you wrote him on the same day that the Sugarman proposal was first submitted?

A. No; the only reference he made to the letter is when I told him that I had informed him personally, repeatedly and that I had written him to the effect that I would not pay a commission, the debtor corporation would not pay a commission, he said, "I will acknowledge all of that."

Q. And did he say at the same time that he didn't think under the circumstances that you had any right to write him that sort of a letter?

A. Well, there was no discussion about the letter. It was a fact that had already been accomplished when he told me he had engaged his attorneys to prepare a claim and he was going to [326] press it against the debtor company.

Q. Didn't he also tell you as he earlier testified here in court, didn't he say to you, "I pulled you out of a terrible hole and all the rest of you, and I sold

(Testimony of Fred G. Stevenot.)

the property for you," and he said, "You didn't have any right to say that you wouldn't pay me because," he said, "As I understand it it is up to the Court and I think you should have paid me. Mr. Carr told you that you should pay me, but you won't do it, so I will just have to sue you. I hate to do it, Mr. Stevenot, I have learned to be very fond of you, but if I must go to Court for justice I will have to do it."

Didn't he make that statement to you at the Clift Hotel?

A. No, sir; he made no such statement to that effect.

Q. Or words to that effect?

A. No, he excused himself that there were cases in the law that would permit him to file a claim, and he engaged attorneys.

Q. Now, you say you haven't had any advices from Mr. Carr at all. Mr. Carr did tell you, didn't he, that you should pay Mr. Wilson in this matter?

Mr. Olson: Same objection, your Honor. It has no relevancy.

Mr. Hildebrand: It is in connection with this conversation, your Honor.

Mr. Olson: He wasn't present at this conversation, your Honor.

Mr. Hildebrand: No, but isn't the fact that Mr. Carr did [327] tell you that you should pay Mr. Wilson?

The Court: When?

A. When?

(Testimony of Fred G. Stevenot.)

Mr. Olson: When?

The Court: What time are you talking about?

Mr. Hildebrand: Well, prior to this conversation with Mr. Wilson at the Clift Hotel.

A. I will answer that, no, he did not.

Q. And hasn't he told you repeatedly that you should pay Mr. Wilson?

Mr. Olson: Again, when?

A. Same situation.

Q. (By Mr. Hildebrand): You deny that you ever discussed this matter with Mr. Carr or have ever been advised by him at any time?

The Court: You are talking now about prior to the Clift Hotel conversation?

Mr. Hildebrand: Prior to the Clift Hotel conversation.

The Court: All right, I will allow him to answer.

Prior to the Clift Hotel conversation did you ever discuss the matter with Mr. Carr?

A. No, I did not.

Q. (By Mr. Hildebrand): You are in disagreement with Mr. Carr at the present time in regard to this matter, aren't you?

Mr. Dudley: I object to that as calling for a conclusion [328] of the witness.

Mr. Olson: Objected to as incompetent, irrelevant and immaterial.

The Court: I don't see how it is relevant.

Mr. Hildebrand: All right.

Q. What would the effect of the foreclosure have

(Testimony of Fred G. Stevenot.)

been if the RFC had foreclosed this property and it had been sold at public auction?

Mr. Dudley: I object to that as calling for a conclusion of the witness. He is not qualified to answer.

The Court: Well, I think he would be qualified. That is, he is not telling us the legal effect.

Mr. Hildebrand: No.

The Court: The effect on the company.

Mr. Hildebrand: That is right.

Q. What did they have a mortgage on the trustee for, the RFC? A. The RFC?

Q. Yes.

A. About a million eight hundred thousand dollars.

Q. On what?

The Court: On what?

A. On the whole company.

Q. (By Mr. Hildebrand): That was on the Garcia property, wasn't it?

A. Well, the mill and everything. [329]

Q. On the whole thing?

A. The whole thing.

Q. And if they had foreclosed then there would have been nothing left for the stockholders?

A. That I don't know. There was no foreclosure, it was never carried out; it is just a supposition or guess. I would fear to submit it to public auction on foreclosure.

Q. Now, so far as Mr. Steinberg's activities were concerned, anything he was to get out of the

(Testimony of Fred G. Stevenot.)

deal, he was only to be paid any profit that these Sugarman people made by the resale of the business, isn't that correct?

A. Well, I don't know that to be true, but Mr. Dicker told me that they had their conversations and they were proposing that Mr. Steinberg accept some arrangement to pay out of the profits and Mr. Steinberg refused to do it, according to Mr. Dicker.

Q. Anyhow, whatever Mr. Steinberg was claiming, so far as you know, the claim that he made, was merely out of any profits they would make from the resale, wasn't it?

A. I don't know that.

Q. So that if he promised Mr. Wilson anything in connection with anything he might get from profits from the resale, that would have nothing to do with the sale of the property for \$4,352,000?

The Court: Doesn't that speak for itself?

Mr. Hildebrand: Yes. [330]

The Court: Mr. Stevenot doesn't have to answer that.

Q. (By Mr. Hildebrand): Now, let's see if we are in agreement on one thing: Without Mr. Wilson or his activities the contacts would not have been made which sold the property, is that right?

A. I can't say that, no.

Q. Well, who?

A. The Sugarman Lumber Company and the J. J. Sugarman Company were active in that sort of work. They may have come forward, I don't know. I can't say that they wouldn't—

(Testimony of Fred G. Stevenot.)

Q. Well, the only people that you knew——

A. I welcomed everything Mr. Wilson did and Mr. Steinberg did, but not at the expense of the stockholders.

Q. But Mr. Wilson and Mr. Steinberg were the people that brought the Sugarmans to you, weren't they?

A. I am telling you, I don't deny that.

Mr. Hildebrand: That is all.

The Court: Any further questions?

Mr. Olson: I have no further questions.

The Court: All right, then, Mr. Stevenot, will you step down.

Mr. Olson: At this time I would like to recall Mr. Wilson, your Honor.

The Court: All right, will you step forward. You have already been sworn, Mr. Wilson. [331]

ALEX E. WILSON

recalled by the Trustee, previously sworn.

The Court: Are you calling him as an adverse witness?

Mr. Olson: Adverse witness, your Honor.

Direct Examination

Q. (By Mr. Olson): Mr. Wilson, when Mr. Nielson, Clarence Nielson, submitted his offer of August 19, 1952 to purchase the timber cutting contracts from the Trustee, at that time you had an agreement with Mr. Nielson, did you not, under which you would receive certain sums from Mr.

(Testimony of Alex E. Wilson.)

Nielson on the resale of the timber covered by those contracts? A. Yes, sir.

Q. Will you state how much compensation you were to receive?

A. After I sold the property for Mr. Stevenot to Mr. Nielson and got paid for that, Mr. Nielson said, "I am buying this property only to resell it, Alec, and you think it is such a good piece of property I want you to resell it for me. I will give you a contract to resell it for me."

He started the contract this way: He said, "If you will sell it for \$6 a thousand I will give you 25 cents a thousand. If you sell it for \$7 I will give you 50 cents a thousand. If you sell it for \$8 I will give you 75 cents a thousand. If you sell it for \$1.00 or over—or \$9.00 or over \$9 a thousand I will give you \$1.00 a thousand."

Mr. Nielson signed the contract with me to that effect. [332]

Q. What is the date of that contract, can you tell us?

A. I don't know what the date of it is. I made that down at Mr. Nielson's house in Santa Cruz. I haven't the contract with me.

Q. It is in August of 1952, though, is it not?

A. I don't know. It is somewhere in there.

The Court: Somewhere in that period of time?

A. Yes, sir; I believe so. I have a copy of it, but inadvertently I didn't bring it with me. I didn't know it would be necessary.

That contract, of course, Mr. Olson, and the pay-

(Testimony of Alex E. Wilson.)

ment I was to receive under that contract was for additional performance, that is, additional sales, or a reselling of the property for him if and when I could do so.

Q. You were to receive this compensation or payment, were you not, whether or not you were the one who resold the timber?

A. Oh, I always do that in my contracts, with all my timber contracts I make it no matter who sells it that I receive the compensation. I do that because I have learned from long experience that if I don't have it tied up exclusively John Jones takes it away from me or someone else, so I make it exclusively when I do business that way.

Q. Did you not recite in that contract that this payment was to be made to you even though you did not resell the timber for Mr. Nielson because you had found these contracts for Mr. [333] Nielson?

A. Yes, that is true. I had purchased them for him.

Q. Do you still contend that you were not acting for Mr. Nielson in connection with that purchase?

A. Why of course I wasn't acting for Mr. Nielson. You know that, Mr. Olson.

Q. Of course you were not?

A. Why, of course I was not acting for him. I was acting for Mr. Nielson if I sold them again for him. I haven't sold them again for him and I have received nothing therefor. The contracts have been sold, I tried to sell them to about 30 people, and

(Testimony of Alex E. Wilson.)

the contracts were so bad, because you had to get the timber off by '56, 67,000,000 feet. Impossible. The rights-of-way were not available and you had to clear the land. So Mr. Nielson sold those contracts, Mr. Olson. He was in a hundred thousand dollars, so he sold them for \$160,000. He sold them to Mr. Buckley of Santa Rosa, and of course that isn't anywhere near \$6 a thousand. It is probably worth two or three dollars a thousand. So if you feel I received compensation, for your information I received not one dollar.

Q. But you admit that this contract with Mr. Nielson provided that you were to receive a compensation under the scale you have given us even though the timber was not resold through your efforts?

A. All my contracts are that way, Mr. Olson.

The Court: Well, it was an exclusive contract?

A. That is right, sir, yes, your Honor, it was an exclusive contract.

Q. Just like an exclusive real estate contract?

A. Yes, your Honor.

Q. (By Mr. Olson): But you further admit that the contract expressly provided that you were to receive this even though you did not resell this timber for him because you had found these timber cutting contracts for Mr. Nielson?

A. Oh, no, not on that basis, Mr. Olson. I worked day and night on the Nielson contracts and if anybody could have sold them I could. That was for my work. Now, if Mr. Buckley wanted to sell

(Testimony of Alex E. Wilson.)

them again I would work for him and do so, but he would have to pay me. That would be another deal. I don't make just one deal and sell it a thousand times, you know. I make one deal like you do, you get a lawsuit and you get paid and you get another lawsuit. I can't sell it 15 times for one fee.

Q. (By Mr. Olson): Do you deny, Mr. Wilson, that this contract with Mr. Nielson expressly recites that you are to receive this amount even though the contracts are not sold through you because you brought these contracts to Mr. Nielson?

A. Oh, no, that is not the thought there at all. I am to be paid only when——

The Court: Does it state that? [335]

Mr. Olson: You say it does not state that?

A. No, I don't think it did. I wrote the contract down in Santa Cruz rapidly, but I don't believe it said that.

Mr. Olson: Well, we will let the contract speak for itself, your Honor. The Petitioner has agreed to produce that. I just have one further question.

Q. Mr. Wilson, you were educated in the field of law, were you not? A. What?

Q. You were educated in the field of law, were you not?

A. I didn't take the Bar, I went to the first war and didn't take my examination .

The Court: But you were educated, you went to school, law school? A. Yes, sir.

Mr. Hildebrand: We were classmates.

(Testimony of Alex E. Wilson.)

A. University of California, yes.

The Court: How long did you go to law school?

A. Just for two years, sir.

Q. (By Mr. Olson): You are familiar are you not with the real estate laws and restrictions of the State of California? A. Yes, I know them.

Q. Have you ever sold any timber for anyone, Mr. Wilson, without a written contract?

A. Yes. [336]

Q. Have you recovered a commission on any such sale?

A. Yes, sir. I sold almost a million dollars worth of timber to Bercut-Richards Cannery here in Sacramento for Dant and Russell without a scratch of a pen, and Tom Richards paid me, I think about \$87,000. I didn't have a scratch of the pen with Mr. Richards of Bercut-Richards, neither did I have a scratch of the pen with Dant & Russell.

Q. But as you testified previously, you admit knowing and have known for a great many years that a written contract is essential for the recovery of a commission under the California law?

A. In California real estate I know that.

Mr. Olson: I have no further questions.

The Court: Any further questions?

Mr. Hildebrand: No, your Honor.

The Court: All right, will you step down, please, Mr. Wilson.

Mr. Olson: I assume that—I want to make this clear—that counsel will produce the agreement con-

cerning which Mr. Wilson has testified, and may that go in evidence as Trustee's Exhibit next in order.

Mr. McMurchie: Yes, assuming he can find it. I can't guarantee it is there. If it is there it will be produced.

Mr. Olson: My only other alternative, your Honor, is to subpoena Mr. Nielson and obtain his copy of the agreement.

Mr. Hildebrand: He says it is there, and we will produce [337] it.

Mr. Wilson: I have it at home, sir, and it is in my file. I just didn't bring that file.

The Court: Well, it will be produced, then, or at least some sort of authenticated copy.

Mr. Olson: It is not necessary as far as I am concerned that it be the original, and may it be understood that that be introduced as Trustee's next in order?

The Court: You have no objection to that coming in?

Mr. Hildebrand: No, your Honor.

The Court: We will reserve an exhibit number for that, Mr. Clerk. You are not charged with keeping it, but we will reserve the next exhibit number in order, which is what?

The Clerk: D.

The Court: Then the Trustee's Exhibit D, which is to be produced by Mr. Wilson, is the Nielson contract with Wilson.

Mr. Olson: The Trustee rests, your Honor.

The Court: Any rebuttal?

Mr. Hildebrand: No, your Honor.

(Thereupon after discussion between Court and counsel the case was ordered to be submitted on briefs 15, 15 and 10.) [338]

[Endorsed]: Filed Aug. 17, 1954.

[Endorsed]: No. 15583. United States Court of Appeals for the Ninth Circuit. Alex E. Wilson, Appellant, vs. Fred G. Stevenot, Trustee of Coastal Plywood & Timber Co., debtor, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: June 3, 1957.

Docketed: June 14, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15583

In the Matter of
COASTAL PLYWOOD & TIMBER COMPANY,
a corporation, Debtor.

In Proceedings for the Reorganization of a corporation.

Re: Claim of Alex E. Wilson.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL AND DESIGNATION OF REC-
ORD ON APPEAL

Appellant hereby adopts as his statement of points under Rule 17(6), the Statement of Points Upon Which Appellant Intends to Rely On Appeal filed in the District Court on May 14, 1957, and appearing in the typewritten transcript of record.

Appellant hereby adopts as his designation of record under Rule 17(6), the Designation of Record on Appeal filed in the District Court, on May 14, 1957, and appearing in the typewritten transcript of record.

Dated: June 13, 1957.

FILES & McMURCHIE,
/s/ By DONALD W. McMURCHIE,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 14, 1957. Paul P.
O'Brien, Clerk.

In the United States of America
 and in the State of New York

Know all men by these presents

In the Matter of

JOHN J. COUGHLIN, Plaintiff
 vs.
 The Corporation of

In the County of New York

Testimony

Before me, the undersigned authority

do hereby certify that

the foregoing is a true and correct

copy of the

same as the same

appears in

the records and

files of the

City of New York

in the

Department of

Records and

Administration

of the City of New York

and that the same

is a true and correct

copy of the same

as the same

appears in

the records and

files of the

City of New York

No. 15,584

**United States Court of Appeals
For the Ninth Circuit**

CHANAN DIN KHAN,

Appellant,

VS.

BRUCE G. BARBER, District Director,
United States Immigration and Nat-
uralization Service,

Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Northern Division.**

Honorable Sherrill Halbert, Judge.

APPELLANT'S OPENING BRIEF.

COLLEY AND SAKUMA,

621 P Street, Sacramento, California,

Attorneys for Appellant.

FILED

AUG 28 1957



Subject Index

	Page
I. Introduction	1
II. Facts	2
III. Issues	3
IV. Argument	3
A. Plaintiff's conduct involved a single scheme or plan	3
V. Conclusion	11

Table of Authorities Cited

Cases	Pages
Berra v. United States, 351 U.S. 131	9
Connally v. Gen. Const. Co., 269 U.S. 385	11
Fong Hau Tan v. Phelan, 333 U.S. 6, 92 L. ed. 433, 68 S. Ct. 374	10
Giglio v. Neely, 208 Fed. 2d 337	6
Marcello v. Ahrens, 212 Fed. 2d 830	7
Norwitt v. U. S., 195 Fed. 2d 127	4
Remmer v. U. S., 205 Fed. 2d 277	6
Shaughnessy v. Pedreiro, 349 U.S. 48, 99 L. ed. 868, 75 S. Ct. 591	2
State v. Brady, 100 Iowa 191, 69 N.W. 290	4
U. S. v. Carrollo, 30 Fed. Supp. 3	7
United States v. Corsi, 63 Fed. 2d 757	7
United States v. Day, 51 Fed. 2d 1022	7, 8
United States v. McCandless, 28 Fed. 2d 287	7
United States v. Neeley, 208 Fed. 2d 337	7
United States v. Scharton, 285 U.S. 518, 52 S. Ct. 416	8, 9
U. S. v. Sullivan, 93 Fed. 2d 79	5
U. S. ex rel. McKenzie v. Savoretti, 200 Fed. 546	7
U. S. ex rel. Mylius v. Uhl, 203 Fed. 152 (1913)	6

Statutes

Administrative Procedure Act, Section 10 et seq. (5 USC 1009)	1
Immigration and Nationality Act of 1952 (66 Stat. 208)....	1
Section 241(a)(4)	3
Section 242	2
Section 1251(a)(4)	3, 4, 7, 10
Internal Revenue Act of 1926, Section 1114(b)	8
Internal Revenue Code of 1939:	
Section 145(b) (26 USC 145(b))	2, 3, 6, 8, 9, 10
Section 3616(a)	10, 11

Texts

20 Am. Jur. 296	5
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No. 15,584

United States Court of Appeals For the Ninth Circuit

CHANAN DIN KHAN,

Appellant,

VS.

BRUCE G. BARBER, District Director,
United States Immigration and Nat-
uralization Service,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Northern Division.

Honorable Sherrill Halbert, Judge.

APPELLANT'S OPENING BRIEF.

I. INTRODUCTION.

This is an action brought by Chanan Din Khan, a resident of the United States since April 25, 1923, but a citizen of Afghanistan, pursuant to Section 10 et seq. of the Administrative Procedure Act, 5 USC 1009, and of the Immigration and Nationality Act of 1952, 66 Stat. 208, to have the Court review an order of defendant ordering him deported, to declare the same void, and to enjoin defendant from executing said order. The District Court had jurisdiction to hear the

matter and this Court has jurisdiction to review the judgment. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 99 L. Ed. 868, 75 S. Ct. 591.

II. FACTS.

The essential facts are set out in the complaint and are not in dispute. Plaintiff is an alien, having entered this country from Afghanistan in 1923. On August 29, 1949, plaintiff's status in this country was adjusted and he was granted a Certificate of Registry. On January 4, 1954, this certificate was rescinded because in 1952 plaintiff had been convicted for Income Tax Evasion (26 USC 145 (b)) in the years 1946 and 1947.

Nothing else was done in the matter until May 2, 1956, when defendant filed an Order To Show Cause and Notice of Hearing upon plaintiff under the provisions of Section 242 of the Immigration and Nationality Act. On June 29, 1956, the hearing on the Order To Show Cause was held at San Francisco, California, before Monroe Kroll, Special Inquiry Officer of the United States Department of Justice, Immigration and Naturalization Service. Mr. Kroll ordered plaintiff deported.

An appeal from this order was duly taken to the Board of Immigration Appeals, which body, on August 31, 1956, upheld the Deportation Order. This action for judicial relief followed. The District Court ruled in favor of deportation.

III. ISSUES.

The primary issue in this case is whether plaintiff is a deportable alien under Section 241 (a)(4) of the Immigration and Nationality Act. There are two aspects of this broad question. These are: (1) Whether the conviction of plaintiff at a single trial of two counts of income tax evasion represented two crimes not involving a single scheme of criminal misconduct, and (2) whether income tax evasion is a crime involving moral turpitude within the meaning of the Immigration and Nationality Act, (3) whether Section 241 (a)(4) of the Immigration and Nationality Act when taken with Sec. 145(b) Internal Revenue Code affords a sufficiently definite standard upon which to base a deportation. We submit that the District Court incorrectly determined each of these issues.

IV. ARGUMENT.

A. PLAINTIFF'S CONDUCT INVOLVED A SINGLE SCHEME OR PLAN.

It is conceded that the very language of Section 1251 (a)(4) of the Immigration and Nationality Act makes it immaterial whether the two alleged crimes resulted in conviction of plaintiff at a single trial. The question in this regard is whether the two counts in the indictment were the result of a single scheme of criminal misconduct. The lawmakers must have anticipated the possibility of trials on a multiple count indictment, some involving a single scheme and others not. Unless we take this view, the exception in Section

1251 (a)(4) reading “not arising out of a single scheme of criminal misconduct” would be meaningless. In other words, the Congress foresaw that some such indictments would involve a single scheme of criminal misconduct, and others would not.

Assuming, for purposes of argument only, that plaintiff in 1946 hit upon a plan by which he would underestimate his income, and hence evade income tax, and meeting with some temporary success in that year he decides to continue his plan and underestimate the tax again. He would have had a single scheme or plan of criminal misconduct, even though the plan was a long range one and extended over two years. There was nothing multiple about the plan. There was but one plan. This does not mean that he could not (as in fact he was) be convicted of two crimes. Our point is that a single plan or scheme of criminal misconduct may result in a multiplicity of crimes, but it does not follow that there has been a like multiplicity of plans or schemes. If there has been but a single scheme or plan of criminal misconduct, Section 1251 (a)(4) has not been violated.

It is true that robbery of two different persons in one night, but at different times does not usually involve a single scheme or plan. On the other hand, several acts of theft by an official of county funds may involve a single plan or scheme. *State v. Brady*, 100 Iowa 191, 69 N.W. 290. Likewise, several successive abortive attempts to assassinate the President of the United States would result in many crimes but only one plan or scheme. *Norwitt v. U. S.*, 195 Fed. 2d 127.

The common sense test would seem to be whether evidence of the crime alleged in the first count of the indictment would be admissible in a prosecution under the second count. Since the theory of admissibility would be whether there was a plan or scheme, if such evidence could be admitted this would show that there was in fact only a single scheme.

There can be no doubt that evasion of income tax in a prior year may be used as evidence to show evasion in a subsequent year under the theory of common plan, scheme or design. This is especially true where in each instance the charge is merely that the tax was understated. See 20 *Am. Jur.* 296. In the case of *U. S. v. Sullivan*, 93 Fed. 2d 79, it was specifically held that evidence of tax evasion in one year is competent to prove tax evasion in a later year. It is true that ordinarily evidence of other crimes is not admissible to prove that the crime charged has been committed, but if there existed a common plan or scheme, an exception is made. It follows that evasion of income taxes for the year 1946 by understating the net income, and evasion of 1947 taxes by the same method represents but one scheme or plan. The scheme or plan to evade taxes is the central point, and it makes no difference that the scheme, once put into operation, was tried for several years.

It has never been easy to determine what is a crime involving moral turpitude. The Senate Committee drafting the Immigration and Nationality Act of 1952 faced the problem of deciding the meaning of the term. It recognized that many classes of crimes involve

it, while many do not. It referred to the case of *U. S. ex rel. Mylius v. Uhl*, 203 Fed. 152 (1913), and by implication accepted the definition given therein. The definition there given was that the act must be one showing the perpetrator to have personal depravity and baseness. It is said that the crime must of necessity involve moral depravity. In other words, all who commit the crime must be presumed to be vile, base and depraved. The case in question involved criminal libel. In analyzing this specific crime the Court said that there are times when criminal libel might show such depravity as to involve moral turpitude, but went on to point out that editors have been held guilty, even though they had no personal relationship with the published matter. Since some libels would involve moral turpitude and some would not, it could not be said that the "crime in its very nature, necessarily involves moral turpitude." See also: *Giglio v. Neely*, 208 F. 2d 337.

A taxpayer may be guilty of a violation of Section 145(b) of the Internal Revenue Code without personally preparing the return, or in fact having anything to do with it except furnishing certain figures to his bookkeeper. The taxpayer need not be depraved or immoral to be convicted. He can simply be negligent, or better still, too trusting in the belief that others will properly keep his records, make his return, and pay his tax. *Remmer v. U.S.*, 205 Fed. 2d 277.

The test seems to be that if acts of baseness or depravity are necessary for conviction, then the crime involves moral turpitude. It is the inherent nature of

offense which governs. *U. S. ex rel. McKenzie v. Savoretti*, 200 Fed. 546; *U. S. v. Carrollo*, 30 Fed. Supp. 3, involved an attempt to evade a tax. The Court said:

“We are not prepared to rule that an attempt to evade payment of a tax due the nation or the commonwealth . . . , wrong as it is, and as unlawful as it is, is an act evidencing baseness, vileness or depravity”

The Court went on to say that the answer must be found in the essential nature of the crime, and not in the skill of prosecutors in drafting pleadings.

It is true that violation of some tax laws necessarily involves moral turpitude. Violation of the narcotics tax laws is an instance of this. See: *Marcello v. Ahrens*, 212 Fed. 2d 830. The reason that violation of this law involves moral turpitude is that there is a moral purpose behind the law. The moral purpose is suppression of narcotics trade and drug addiction. There is no moral purpose in income tax law. The sole purpose of the Federal Income Tax Law is to raise revenue.

It is quite possible that some income tax evasion cases, because of surrounding facts and circumstances, may involve moral turpitude. Before, however, a deportation under Section 1251 (a) (4) Immigration and Nationality Act may result from conviction of a crime involving moral turpitude, the crime by its very nature must involve moral turpitude. *United States v. Neeley*, 208 Fed. 2d 337, 340-342; *United States v. Corsi*, 63 Fed. 2d 757, 759; *United States v. Day*, 51 Fed. 2d 1022; *United States v. McCandless*, 28 Fed. 2d 287.

Since the crimes of which it is alleged that plaintiff was convicted each involved a violation of Section 145(b) U. S. Internal Revenue Code, it becomes pertinent to explore further the question as to whether a violation of that law always involves moral turpitude. If an intent to defraud is an essential element of the crime, then it involves, necessarily, moral turpitude. *United States v. Day*, supra.

It is now the conclusively settled law of the land that a violation of Section 145(b) U. S. Internal Revenue Code does not necessarily involve fraud or moral turpitude. *United States v. Scharton*, 285 U.S. 518, 52 S. Ct. 416.

It is difficult to reconcile the *Scharton* case, supra, with the ruling of this Court in *Chu v. U. S.*, July 11, 1957 (not yet reported). Section 1114(b) of the Internal Revenue Act of 1926, like Section 145(b) of the Internal Revenue Code of 1939, under which appellant was tried and convicted, made it a felony for any person to willfully attempt in any manner to evade or defeat any tax imposed by this law. *Scharton* was indicted under Section 1114(b) of the 1926 Code, but the District Court quashed the indictment on the ground that fraud was not an essential element of the crime, and for that reason the longer statute of limitations provided in the fraud section of the statute did not apply. There, as here and in the *Chu* case the Government contended that fraud is implicit in the concept of evading or defeating a tax. The United States Supreme Court rejected this contention and held that the six-year statute of limitations applied only in cases

“in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense.” The judgment quashing the indictment was affirmed.

Examination of the basis of the broad statement of the learned trial judge in this case to the effect that the Courts have held “with apparent unanimity”, that a conviction under 145(b) requires proof of “a specific intent to evade taxation”, amounting to an intent “to defraud the United States,” produces an interesting result.

In the first place, the one case to the contrary, the *Scharton* case, *supra*, is not mentioned. What is more important, however, is the fact that the *Scharton* case is the only pronouncement by the United States Supreme Court on the subject. With all due deference and respect to them, we submit that none of the lower courts cited could have, under our judicial system, any power to overrule the United States Supreme Court.

Examination of the basis of the statement by the trial Court produces another interesting result. Footnote No. 5 of the opinion below ends “*Cf. Berra v. United States*, 351 U.S. 131.” This case could hardly support the reasoning of the trial Court or give aid and comfort to the Government in this case. The *Berra* case holds that every tax evasion does not necessarily involve fraud because some are felonies and some are merely misdemeanors. It is stated that the facts required to prove the felony (145(b)) violation are “identical with those required to prove” the

misdemeanor (3616(a)). This amounts to a finding by the highest Court of the land that income tax evasion is at times a felony, and may involve moral turpitude, but at times it is a misdemeanor only, and no fraud or moral turpitude is involved.

If deportability is to be made to turn upon the caprice of a prosecutor in choosing whether to denominate the crime charged as 145(b) or as 3616(a), we then truly have government by men and not by law. Two aliens could file identical tax returns except as to name, for two years, and they could be false in identical particulars, and yet the prosecutor could call one a felony and charge violations of 145(b) and then proceed to deport his chosen victim, and charge the other with the misdemeanor (Section 3616(a)) and save the object of his official benevolence from the prospect of being thrown back upon shores long forgotten.

It is respectfully submitted that if deportability may be made to turn upon the whim or caprice of the prosecutor who drafts the indictment, a serious question as to the constitutionality of section 1251 (a)(4) of the Immigration and Nationality Act arises. If it is applied as urged here by the Government it is void for vagueness, and hence unconstitutional.

It is now the settled law of the land that deportation is such a harsh and drastic penalty that it will be treated as a forfeiture or penalty, and the rules applicable to testing criminal statutes for vagueness will be applied. *Fong Hau Tan v. Phelan*, 333 U.S. 6, 92 L. ed. 433, 68 S. Ct. 374. The test is whether the

statute “conveys sufficiently definite warning” to the actor as to the probable consequences of this act. *Connally v. Gen. Const. Co.*, 269 U.S. 385. The very word “warning” denotes notice in advance. How could appellant in this case have known in advance that he would be charged as a felon and be made subject to deportation, or whether he would be simply charged under Sec. 3616(a) and hence be convicted of two misdemeanors?

We submit that had appellant been charged under the misdemeanor section (3616(a)) his crime would not have been considered as one involving moral turpitude, since the “moral turpitude” crimes have been generally held to be felonies only.

V. CONCLUSION.

We are not “waving the flag” or pleading for sympathy when we respectfully repeat the truism that ours is a nation made up of immigrants and their offspring. Our country was founded and largely made great by the infusion into the mainstream of our national life a steady flow of men and women from the “four corners” of the earth. Ours is a fertile, prosperous and great land—in fact the greatest. It is truly “the land the Lord remembered.”

But what has this to do with Chanan Din Khan? It has much to do with him. This Court is called upon to interpret a section of our immigration laws, and a section of our tax laws as it relates thereto. In making

these interpretations this Court should consider the fact that for nearly two hundred years ours has been the "open door", and we have entreated the world to send us its "teeming millions." We should not now so technically and restrictively interpret our laws, so as to fashion reasons and apparent justification for closing our "open door", or for sending back those who, though they have spent their useful and productive years with us, have erred in a fashion rather common to the native born. For the alien we say the usual penalties of fine and imprisonment are not cruel enough. We must now banish him! This is hardly in keeping with the American ideal of fair play for all regardless of race, nationality or place of birth.

The judgment below should be reversed.

Dated, Sacramento, California,

August 27, 1957.

Respectfully submitted,

COLLEY AND SAKUMA,

Attorneys for Appellant.

No. 15,584

United States Court of Appeals
For the Ninth Circuit

CHANAN DIN KHAN,

Appellant,

VS.

BRUCE G. BARBER, District Director,
United States Immigration and Nat-
uralization Service,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Northern Division.

APPELLEE'S REPLY BRIEF.

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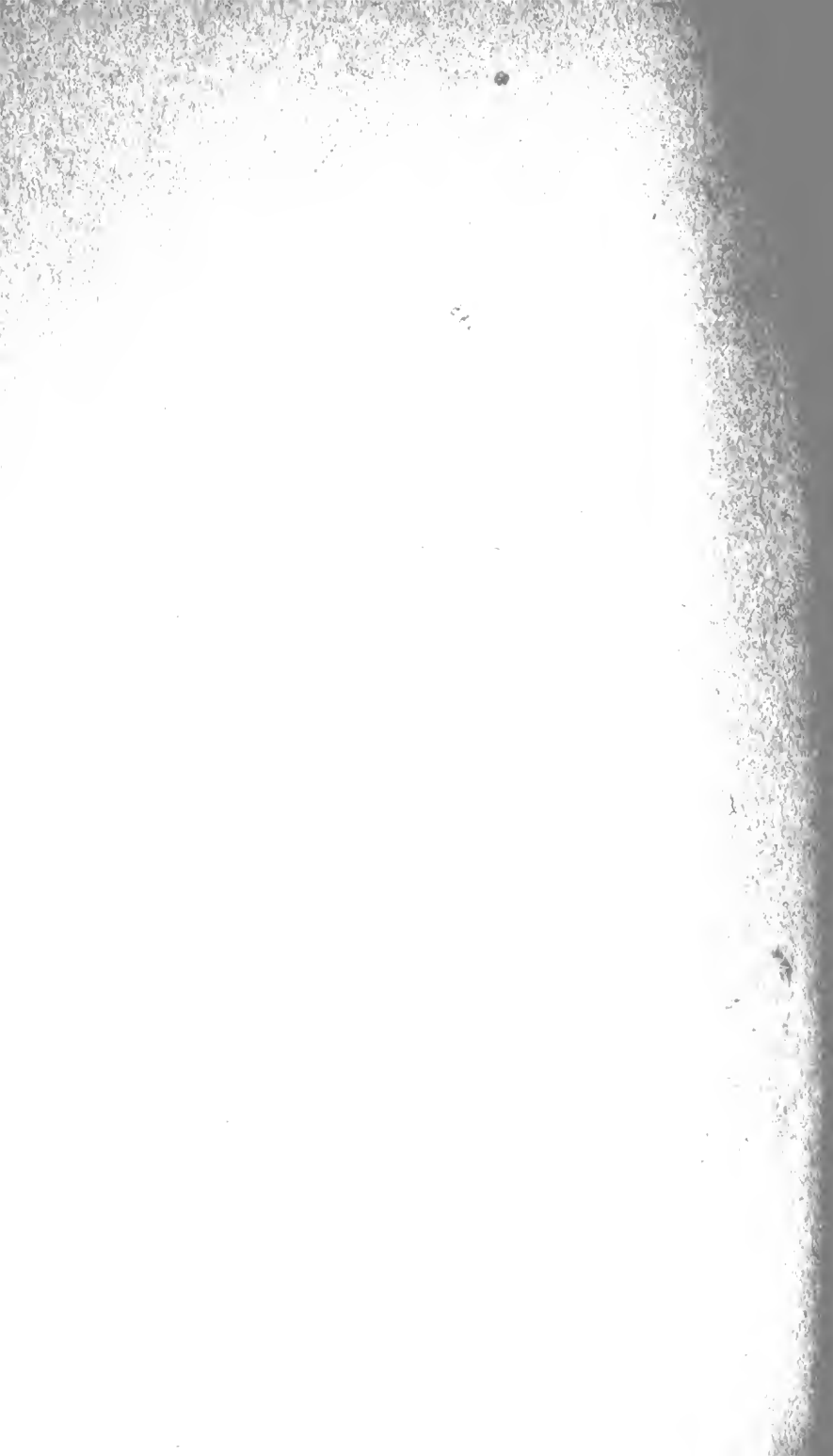
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Subject Index

	Page
Jurisdictional statement	1
Facts	2
Question presented	4
Statutes	4
Argument	6
A. Appellant was convicted of two crimes at a single trial	6
B. Violation of Section 145(b) as charged in the indictment is a crime involving moral turpitude.....	10
Conclusion	15

Table of Authorities Cited

Cases	Pages
Achilli v. United States, 353 U.S. 373	15
Cave v. United States, 59 F. 2d 464 (8 Cir.)	7
Chanan Din Khan v. Barber, 147 F. Supp. 771, 775 (1957) ..	10, 15
Chu v. United States, July 11, 1957 (not yet reported) ..	11, 14, 15
Hoyer v. U. S., 223 F. 2d 134 (8 Cir.)	9
Jordan v. De George, 341 U.S. 223 (1951), 71 S. Ct. 203, 95 L. Ed. 886	14
Marcello v. Bond, 349 U.S. 302	2
Myres v. United States, 174 F. 2d 329 (8 Cir.)	7
Norwitt v. United States (9 Cir.), 195 F. 2d 127 (cert. den. 344 U.S. 817)	7
Neff v. U. S., 105 F. 2d 688 (8 Cir.)	9
Screws v. U. S., 335 U.S. 91	14
Shaughnessy v. Pedreiro, 349 U.S. 48	2
Spies v. U. S., 317 U.S. 492	12
Tseung Chu v. Cornell (C.A.), No. 15,344 (9 Cir.)	10
U. S. v. De Silvestro, 147 F. Supp. 300	9
U. S. v. Fawcett, 115 F. 2d 764 (3 Cir.)	9
United States v. Croessant, 178 F. 2d 96 (3 Cir.)	7
United States v. Johnson, 319 U.S. 203	7
United States v. Scharton, 283 U.S. 518, 52 S. Ct. 416.....	11, 12
United States v. StoeHR, 100 F. Supp. 143 (3 Cir.)	7
United States v. Sullivan, 98 F. 2d 79	7

Statutes

Internal Revenue Code of 1939, as amended:	Pages
26 U.S.C. Sec. 145(a)	13
26 U.S.C. Sec. 145(b)	2, 3, 4, 9, 10, 11, 13, 15
26 U.S.C. Sec. 3616(a)	5, 15
Public Law 154, Revenue Act of 1932, 47 Stat. 169:	
Section 1108, at page 288	12
Public Law 414, Act of June 27, 1952, 66 Stat. 163:	
Section 241(a)(4), 8 U.S.C. 1251(a)(4)	4, 5, 6
8 U.S.C. 1252(b)	3
28 U.S.C. 1291	2
Revenue Act of 1926:	
Section 1110	12
Section 1114(b)	11, 12

Introduction	1
Public Law 86-608	2
Section 101	3
Section 102	4
Section 103	5
Section 104	6
Section 105	7
Section 106	8
Section 107	9
Section 108	10
Section 109	11
Section 110	12
Section 111	13
Section 112	14
Section 113	15
Section 114	16
Section 115	17
Section 116	18
Section 117	19
Section 118	20
Section 119	21
Section 120	22
Section 121	23
Section 122	24
Section 123	25
Section 124	26
Section 125	27
Section 126	28
Section 127	29
Section 128	30
Section 129	31
Section 130	32
Section 131	33
Section 132	34
Section 133	35
Section 134	36
Section 135	37
Section 136	38
Section 137	39
Section 138	40
Section 139	41
Section 140	42
Section 141	43
Section 142	44
Section 143	45
Section 144	46
Section 145	47
Section 146	48
Section 147	49
Section 148	50
Section 149	51
Section 150	52
Section 151	53
Section 152	54
Section 153	55
Section 154	56
Section 155	57
Section 156	58
Section 157	59
Section 158	60
Section 159	61
Section 160	62
Section 161	63
Section 162	64
Section 163	65
Section 164	66
Section 165	67
Section 166	68
Section 167	69
Section 168	70
Section 169	71
Section 170	72
Section 171	73
Section 172	74
Section 173	75
Section 174	76
Section 175	77
Section 176	78
Section 177	79
Section 178	80
Section 179	81
Section 180	82
Section 181	83
Section 182	84
Section 183	85
Section 184	86
Section 185	87
Section 186	88
Section 187	89
Section 188	90
Section 189	91
Section 190	92
Section 191	93
Section 192	94
Section 193	95
Section 194	96
Section 195	97
Section 196	98
Section 197	99
Section 198	100

No. 15,584

**United States Court of Appeals
For the Ninth Circuit**

CHANAN DIN KHAN,

Appellant,

VS.

BRUCE G. BARBER, District Director,
United States Immigration and Nat-
uralization Service,

Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Northern Division.**

APPELLEE'S REPLY BRIEF.

JURISDICTIONAL STATEMENT.

Appellant by his complaint sought review of the final order of the Immigration and Naturalization Service that appellant is a deportable alien. He asked the Court to declare the order void and to enjoin appellee from executing it. Appellant was not in the custody of appellee at the time the complaint was filed.

The Supreme Court of the United States has held that judicial review of the proceedings of the Immi-

gration and Naturalization Service may be effected by remedy other than habeas corpus.

Shaughnessy v. Pedreiro, 349 U.S. 48;

Marcello v. Bond, 349 U.S. 302.

The Court of Appeals has jurisdiction of appeals from all final decisions of the District Courts under 28 U.S.C. 1291.

FACTS.

Appellant entered the United States unlawfully at some time prior to 1924 by deserting from an unidentified vessel upon which he was employed as a seaman. In 1949 he applied for adjustment of his status. The application was granted on August 28, 1948.⁹

On January 25, 1952, after trial before a jury, appellant was convicted on an indictment in two counts charging him with violation of section 145(b) of the Internal Revenue Code of 1939, 26 U.S.C. 145(b).

The first count charged:

“That on or about the 15th day of March, 1947 . . . Chanan Din Khan . . . did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue District of California, at San Francisco, California, a false and fraudulent income tax return wherein he stated that his net

income for said calendar year was the sum of \$2,325.80 and that the amount of tax due and owing thereon was the sum of \$24.00, whereas; as he then and there well knew, his net income for the said calendar year was the sum of \$12,433.42, upon which said net income he owed the United States of America an income tax of \$2,664.47.”

The second count charged violation of Section 145(b) for the calendar year 1947 by stating his net income was the sum of \$157.15 and that no tax was due and owing thereon, whereas his net income for 1947 was \$9,319.16—otherwise the wording of the second count was identical to the first count.

By order of the District Director of Immigration and Naturalization Service at Los Angeles, dated January 4, 1954, the Certificate of Registry adjusting appellant's status was rescinded on appeal. Said order was affirmed April 1, 1954.

An Order to Show Cause was served on appellant on May 2, 1946 and at the hearing in accordance with 8 U.S.C. 1252(b) appellant was found deportable on the charge contained in the Order to Show Cause, to wit:

“Section 241(a)(4) Immigration & Nationality Act. (8 U.S.C. 1251(a)(4) convicted of two crimes involving moral turpitude.

Violation of 26 U.S.C. 145(b), Income tax evasion, two counts, for the years 1946 and 1947. An appeal to the Board of Immigration Appeals was dismissed on August 31, 1956.”

The complaint herein was filed on September 27, 1956 and the Judgment from which this appeal was noted was entered February 20, 1957.

QUESTION PRESENTED.

Appellant states two questions:

(1) Does appellant's conviction at a single trial, on one indictment of two separate counts charging violation of 26 U.S.C. Section 145(b), for the years 1946 and 1947, constitute two crimes within the meaning of 8 U.S.C. 1251(a)(4);

(2) Does the conviction on the two counts under 26 U.S.C. 145(b) as charged in the indictment constitute a conviction of two crimes involving moral turpitude within the meaning of 8 U.S.C. 1251(a)(4).

Appellee fails to detect a third issue concerning a "sufficiently definite standard" not contained within the two stated questions.

STATUTES.

Internal Revenue Code of 1939, as amended: 26 U.S.C. Sec. 145(b):

"Failure to collect any pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who will-

fully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

26 U.S.C. Sec. 3616(a):

"Whenever any person——

(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; or

(b) Neglect to obey summons. Being duly summoned to appear to testify, or to appear and produce books as required under section 3615, neglects to appear or to produce said books——
He shall be fined not exceeding \$1000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

Public Law 414, Act of June 27, 1952, 66 Stat. 163:
Section 241(a)(4), 8 U.S.C. 1251(a)(4):

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who——

* * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for

a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;”

ARGUMENT.

A. APPELLANT WAS CONVICTED OF TWO CRIMES AT A SINGLE TRIAL.

Appellant concedes that the conviction of two crimes may occur at a single trial. His contention is that the two crimes charged in the two counts in the indictment upon which he was convicted involve a single scheme of criminal misconduct and that, therefore, he was not convicted of two crimes within the meaning of Sec. 241(a)(4).

Appellant makes no attempt to support his contention by reference to facts contained in the record. On the contrary, he asks the Court to assume (Brief p. 4) “for purposes of argument only” that appellant in 1946 “hit upon a plan”. A second assumption occurs at this point, in that appellant assumes by using the word “plan” he has necessarily included all the essential facts from which a Court may conclude the existence of a single scheme resulting in a multiple offense.

There is no question that a single scheme or plan may result in a multiplicity of crimes, but the existence of the single scheme is not established by assumption.

The crime denounced by Sec. 145(b) is complete when the taxpayer wilfully and knowingly files a false and fraudulent return with intent to defeat or evade any part of the tax due the United States.

United States v. Croessant, (3rd Cir.) 178 F.

2d 96, 98 cert. den. 339 U.S. 927;

Cave v. United States, (8th Cir.) 59 F. 2d 464;

Myres v. United States, (8th Cir.) 174 F. 2d 329, 334 cert. den. 338 U.S. 849.

An attempt to evade income tax is a separate offense for each year.

United States v. Sullivan, (2nd Cir.) 98 F. 2d 79, 80;

Norwitt v. United States, (9th Cir.) 195 F. 2d 127 cert. den. 344 U.S. 817;

United States v. Stoehr, (3rd Cir.) 100 F. Supp. 143, 159 aff. 196 F. 2d 276 cert. den. 334 U.S. 826;

United States v. Johnson, (7th Cir.) 123 F. 2d 111, 119 reversed on other grounds 319 U.S. 203.

Several separate offenses may be committed during the execution of one plan. However, appellant's citation of *Norwitt v. United States*, 195 F. 2d 127, in support of the proposition that several successive abortive attempts to assassinate the President of the United States would result in many crimes, but only one plan or scheme is inaccurate and misleading.

In *Norwitt, United States v. Johnson*, 123 F. 2d 11, was cited in support of the contention

“while there may be such a crime in each year * * * once the attempt has been consummated by the filing of a false and fraudulent return in any particular year, the offense has been completed for that year * * *”

The Court said p. 133,

“The sole case cited to support this remarkable proposition is *U. S. v. Johnson* * * *. That decision, however, is not at all in point. In that case the first four counts of the indictment charged the same offense except *for different years*. In the light of those facts, the Court correctly said ‘an attempt to evade income tax is a separate offense for each year.’ That is a far cry from saying that *several* such separate offenses may not be committed for the same year.”

“The appellant’s argument may be reduced to an absurdity. A man attempts to assassinate the President of the United States on January 1, 1952. He escapes arrest and tries the same thing the next day. He keeps up this record of poor marksmanship and swift flight for every one of 366 days of the year. Is he guilty of one attempt against the President’s life—or of 366?”

The absurdity of the argument, of course, is that there are obviously 366 attempts. But there are also 366 plans. There would probably be a single purpose or theme—assassination—but a new plan would be required with each attempt.

Appellant’s so-called “common sense test” (Brief p. 5) is also inaccurate and misleading. Admissibility of the evidence of the crime in the first count in the

prosecution of the second count, provides no such test in that the theory is not whether there was plan or scheme, but rather was there an *intent* or *motive* since the crime is one in which the state of mind is an element.

U. S. v. Fawcett, (3rd Cir.) 115 F. 2d 764, 768;

Neff v. U. S., (8th Cir.) 105 F. 2d 688;

Hoyer v. U. S., (8th Cir.) 233 F. 2d 134;

U. S. v. De Silvestro, 147 F. Supp. 300.

Appellant has carried this inaccuracy into a false conclusion in the second paragraph on page 5 of the brief. He says:

“It is true that ordinarily evidence of other crimes is not admissible to prove that the crime charged has been committed, but if there existed a common plan or scheme, an exception is made. It follows that evasion of income taxes for the year 1946 by understating the net income and evasion of 1947 taxes by the same method represents but one scheme or plan.”

The conclusion is founded upon the undisclosed false premise—“all crimes in the prosecution of which evidence of other crimes is admissible have but one scheme or plan.” The essential common ingredient in the offense is the *intent to evade* regardless of how many plans or schemes may be involved. And so with appellant here his purpose in each count was to evade the taxes by filing a false and fraudulent tax return. The vital element of the offense under 145(b) is *by wilful attempt in any manner to evade or defeat any tax*. Appellant was convicted for each violation. There

is nothing to support any assumption of a single scheme covering the two years. The single consistent *theme* not "scheme" is the intent of appellant to evade paying his taxes.

**B. VIOLATION OF 145(b) AS CHARGED IN THE INDICTMENT
IS A CRIME INVOLVING MORAL TURPITUDE.**

This Court in the case of *Tseung Chu v. Cornell*, No. 15344, July 11, 1957, has established the rule of the Ninth Circuit Court of Appeals.

"We follow the rule laid down in the DeGeorge case, *supra*, and *Bloch v. U. S.* *supra* (1955), that an intent to defraud the Government is a prerequisite to conviction under Section 145(b)⁶ and hence, a conviction thereof where such fraud is charged in the indictment, is conviction of a crime involving moral turpitude."

Footnote 6 states:

"This same rule was followed in this Circuit by a recent District Court case. (*Chanan Din Khan v. Barber*, 147 F. Supp. 771, at page 775) which relied (in Note 5) on, . . ."

Note 5 of the Opinion of the Court below is found at page 15 of the Transcript.

Each Count of the indictment charges appellant "did wilfully and knowingly attempt to defeat and evade . . . income tax . . . by filing and causing to be filed a false and fraudulent income tax return."

Appellant at page 8 of the brief concedes:

“If an intent to defraud is an essential element of the crime, then it involves, necessarily, moral turpitude. *United States v. Day*, supra.”

Appellant then continues in the next paragraph of his brief to say:

“It is now the conclusively settled law of the land that a violation of Section 145(b) of the United States Internal Revenue Code does not necessarily involve fraud or moral turpitude. *United States v. Scharton*, 285 U.S. 518, 52 S. Ct. 416.”

Appellant then says:

“It is difficult to reconcile the *Scharton* case, supra, with the ruling of this Court in *Chu v. U. S.*, July 11, 1957 (not yet reported).”

Appellee does not agree with appellant that “it is now the conclusively settled law of the land that a violation of Section 145(b) . . . does not necessarily involve fraud or moral turpitude.” *United States v. Scharton* does not establish any such principle.

The *Scharton* case was concerned with Section 1114(b) of the Revenue Act of 1926, and the applicability of the three or six-year limitation contained in Section 1110.

Section 1114 had three parts:

(a) Made “willful failure to pay taxes, to make a return, to keep necessary records or to supply requisite information” a misdemeanor.

(b) Made a "willful attempt, in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony."

(c) Made "willfully aiding, assisting, procuring, counseling, or advising preparation or presentation of a false or fraudulent return, affidavit, claim or document" a felony.

The Supreme Court in *Scharton* said, page 521:

"There are, however, numerous statutes expressly making intent to defraud an element of a specified offense against revenue laws. Under these, an indictment failing to aver that intent would be defective; but under Section 1114(b) such an averment would be surplusage, for it would be sufficient to plead and prove a willful attempt to evade or defeat."

The Court, therefore did not apply the six-year period of the statute of limitations, starting page 522:

"The purpose of the proviso is to apply the six-year period to cases 'in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense.'"

The *Scharton* case was decided April 11, 1932. Congress promptly thereafter on June 6, 1932 in Public Law 154, Revenue Act of 1932, 47 Stat. 169, Sec. 1108, at page 288, reenacted Section 1110 of the Revenue Act of 1926, to make the six-year statutory period applicable to 1114(b) offenses.

More definitive of the nature of the crime is the case of *Spies v. U. S.*, 317 U.S. 492. The petitioner

had been convicted of attempting to defeat or evade income tax in violation of Section 145(b). Section 145(a) made willful *failure to pay* a tax or *make a return* a misdemeanor. Sec. 145(b) made a willful attempt in any manner to *evade* or *defeat* any tax a felony. Petitioner had requested an instruction to the effect that the jury could find him not guilty of a willful attempt to defeat or evade the tax if they found that he had only willfully failed to make a return and willfully failed to pay the tax.

Beginning at page 496, the Court discusses the sanctions contained in the Revenue Code applicable to violation. Attention is called particularly to the following, at page 496:

“If any part of the deficiency is due to negligence or intentional disregard of rules and regulations but without intent to defraud, four percent of such deficiency is added thereto, and if any part of any deficiency is due to fraud with intent to evade tax, the addition is 50 percent . . . Willful failure to pay the tax when due is punishable as a misdemeanor. Sec. 145(a). The climax of this variety of sanctions is the serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat the tax. Sec. 145(b).”

Referring to willfulness in relation to a knowing and intentional default in payment, the Court at page 498 said:

“We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.”

And again on page 498:

“The difference between the two offenses (145(a) and 145(b)), it seems to us is found in the affirmative action implied from the term ‘attempt’ as used in the felony subsection . . . This (145(b)) is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation as would be the case say, of attempted murder . . . We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omission that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine it with a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.”

See also

Screws v. U. S., 335 U.S. 91.

Certainly the additional, factor “positive” in nature involves “moral turpitude.”

In the *Chu* case, *supra*, this Court looked to the Supreme Court “in the leading case of *Jordan v. De George*, 341 U.S. 223 (1951), 71 S. Ct. 203, 95 L. Ed. 886” as the controlling authority, and from page 227 quoted the following:

“Without exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude . . . In every deportation cases where fraud has been proved,

federal courts have held that the crime in issue involved moral turpitude. This has been true in a variety of cases . . .”

As in the *Chu* case, appellant herein was indicted and convicted of willfully and knowingly attempting to evade income taxes by filing and causing to be filed a *false* and *fraudulent* income tax return. He was convicted of a crime involving moral turpitude.

Appellant in the *Chu* case filed a petition for certiorari in the Supreme Court on October 4, 1957, docket number 530. (26 L.W. 3120.)

Such concern as appellant may indicate on page 10 over the difference or lack thereof, between Sections 145(b) and 3616(a) of the 1939 Revenue Code, would appear to be completely resolved by the Supreme Court decision in *Achilli v. United States*, 353 U.S. 373, May 27, 1957. The Court concluded that “3616(a) did not apply to evasion of income tax.”

CONCLUSION.

The Court’s attention is called to the quotation in the *Chu* case, from the District Court’s Opinion, page 6, in this case:

“In *Chanan Din Khan v. Barber*, 147 F. Supp. 771 (1957) the same matter was at issue. There the District Court found that a violation of Section 145(b) is a crime involving moral turpitude . . . the courts have, with apparent unanimity, held that in order for a conviction under Section 145(b) to stand, the Government is required to

prove that the evading taxpayer had a specific intent to evade *taxation, amounting to an intent to defraud* the United States. (Emphasis by the Court.) Fraud is so inextricably woven into the term 'willfully' as it is employed in 145(b) that it is clearly an ingredient of the offense proscribed by that section. Only by creating unwarranted semantic distinctions could a contrary conclusion be reached."

It is respectfully submitted that the judgment of the Court below should be affirmed.

Dated, San Francisco, California,

October 31, 1957.

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No. 15,587

**United States Court of Appeals
For the Ninth Circuit**

JOHN COSTELLO, Trustee in Bankruptcy
of Leonard Plumbing and Heating
Supply, Inc., bankrupt,

Appellant,

vs.

J. A. FAZIO and LAWRENCE C. AMBROSE,

Appellees.

**Appeal from Order of United States District Court,
Northern District of California, Southern Division,
Confirming Referee in Bankruptcy's Order Overruling
Trustee's Objections to Claims of J. A. Fazio
and Lawrence C. Ambrose.**

APPELLANT'S OPENING BRIEF.

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SEP - 3 1957

Subject Index

	Page
Jurisdiction	1
Statement of the case	2
Specifications of error	5
Summary of the argument	6
Argument	7

I.

Claims of controlling shareholders will be deferred or subordinated to outside creditors where a corporation in bankruptcy has not been adequately or honestly capitalized or has been managed to the prejudice of creditors or to do otherwise would be unfair to creditors	7
--	---

II.

A promise to pay a note out of an uncertain fund such as profits or net income does not accrue until the event takes place and accordingly is not provable in bankruptcy	14
Conclusion	16

Table of Authorities Cited

Cases	Pages
Arnold v. Phillips, 117 F. 2d 479 (C.C.A. 5th, 1941) (cert. den. 313 U.S. 583, 85 L.Ed. 1539)	12
Carter v. Bogden, 13 F. 2d 90	13
Horacek v. Smith (1948), 33 Cal. 2d 186, 199 F. 2d 929....	15
In re The Literary Digest (2nd Cir., 1939), 105 F. 2d 957..	14
Manhattan Trust Co. v. Seattle Coal & Iron Co., 16 Wash. 499, 48 P. 333	13
Pepper v. Litton, 308 U.S. 295, 60 Sup. Ct. 238, 84 L. Ed. 281	9
Taylor v. Standard Gas & Electric Co., 306 U.S. 307, 59 Sup. Ct. 543, 83 L. Ed. 699	6, 7, 8
Thompson v. England (9th Cir., 1955), 226 F. 2d 488	14
Van Buskirk v. Kuhns (1913), 164 Cal. 472, 129 P. 587, 44 L.R.A., N.S., 710	15

Statutes

Bankruptcy Act:	
Section 2a (2) (11 U.S.C. Sec. 11a (2))	2
Section 24 (11 U.S.C. Sec. 47)	2
Section 39e (11 U.S.C. Sec. 67e)	1
Section 77B	8

Texts

Ballantine on Corporations, 2d Ed., Section 129, page 301..	7
42 Col. L. Rev. 1124 at 1129	13

United States Court of Appeals For the Ninth Circuit

JOHN COSTELLO, Trustee in Bankruptcy
of Leonard Plumbing and Heating
Supply, Inc., bankrupt,

Appellant,

vs.

J. A. FAZIO and LAWRENCE C. AMBROSE,

Appellees.

**Appeal from Order of United States District Court,
Northern District of California, Southern Division,
Confirming Referee in Bankruptcy's Order Overruling
Trustee's Objections to Claims of J. A. Fazio
and Lawrence C. Ambrose.**

APPELLANT'S OPENING BRIEF.

JURISDICTION.

This is an appeal from an order of the United States District Court, Northern District of California, affirming the order of the Honorable Bernard J. Abrott, one of its referees in bankruptcy, overruling the trustee's objections to the proofs of the claims of J. A. Fazio and Lawrence C. Ambrose, claimants and appellees.

Jurisdiction generally is sustained under Section 39c of the Bankruptcy Act (11 U.S.C. Sec. 67c) which

provides for review of orders of a referee by a judge, and by Section 2a (2) of said Act (11 U.S.C. Sec. 11a (2)) which vests the District Court with jurisdiction to reconsider allowed or disallowed claims.

Jurisdiction of this Court to review the order of said District Court is conferred by Section 24 of the Bankruptcy Act (11 U.S.C. Sec. 47) which vests United States Courts of Appeals with appellate jurisdiction from the several Courts of Bankruptcy within their respective jurisdictions in controversies arising in proceedings in bankruptcy.

STATEMENT OF THE CASE.

The bankrupt corporation was originally organized as a partnership in October, 1948, the Certificate of Fictitious Name showing J. A. Fazio, Lawrence C. Ambrose and B. T. Leonard doing business under the fictitious name of "Leonard Plumbing & Heating Supply Co." No written agreement of partnership was entered into but apparently the partners all agreed to share equally in profits. The original capital contributions of the partners consisted of the following:

J. A. Fazio—Inventories valued at \$39,606.40;

L. C. Ambrose—Cash in the sum of \$4,000.00;

B. T. Leonard—Cash in the sum of \$1,200.00 (this contribution seemingly having been withdrawn in the first year). (Trustee's Exhibit 4.)

(Claimant's Exhibit No. 2.)

With the close of the fourth year of operation in which the partnership suffered a net loss of \$22,521.34, the decision was made to incorporate and Articles of Incorporation were filed on September 22, 1952, under the name of "Leonard Plumbing & Heating Supply, Inc." Shortly before incorporation the capital accounts of the partners stood as follows:

J. A. Fazio—\$43,169.61;

L. C. Ambrose—\$6,451.17;

B. T. Leonard—\$2,000.00. (Trustee's Exhibit 4.)

On September 15, 1952, just 7 days prior to the filing of Articles of Incorporation, the partnership gave J. A. Fazio a promissory note for \$41,169.61, and L. C. Ambrose a promissory note for \$4,451.17, at the same time reducing the capital accounts of both to \$2,000.00. (Trustee's Exhibits 4, 5; Claimant's Exhibit 4.) The closing balance sheet showed the partnership to be subject to current liabilities of \$162,162.22 (including the liabilities represented by the notes to partners) which was balanced by current assets of but \$160,791.87 (represented mostly by inventory). (Trustee's Exhibit 3.)

The corporation was capitalized for 600 shares of no par value common stock valued at \$10.00 per share, and on application to the Commissioner of Corporations of the State of California a permit was issued authorizing the issuance of 200 shares of the stock to each of the partners in consideration for the transfer of the business and assets of the partnership, subject to the usual escrow provision. (Trustee's Exhibit 2.)

No further capital contributions were made by the partners (now shareholders) and no consideration was given for the corporation's stock other than the transfer of the partnership business, in which the current liabilities exceeded the current assets at the time of transfer. (Trustee's Exhibit 2.)

After suffering continued losses, the corporation made an assignment for the benefit of creditors to the San Francisco Board of Trade in June of 1954 and on October 8, 1954, it filed a voluntary petition in bankruptcy. On March 18, 1955, two claims were filed by J. A. Fazio against the bankrupt estate, one in the sum of \$34,147.55 based upon the promissory note and the other in the sum of \$21,851.87 contingent upon a secured claim to American Trust Company upon whose note Fazio stood as surety. On March 28, 1955 a claim was filed by Lawrence C. Ambrose in the sum of \$7,871.17, based upon the promissory note similarly issued by the partnership just before incorporation. Discrepancies between the value of these claims and the amount of the notes to claimants is due to certain set-offs against the corporation and transfers between Fazio and Ambrose personally. It is the claims of Fazio and Ambrose which the trustee now seeks to subordinate to the claims of other general creditors.

After hearings were held on January 17, January 25 and February 13, 1956, the referee in bankruptcy rendered his findings of fact, conclusions of law and judgment on August 28, 1956, wherein it overruled the trustee's objections to the proofs of the claims of J. A. Fazio and Lawrence C. Ambrose, claimants and ap-

pellees. Thereafter appellant petitioned the Court below for a review of the referee's order, which, after a hearing and without opinion, affirmed the referee's order.

SPECIFICATIONS OF ERROR.

The points upon which appellant relies are that:

1. The District Court erred in affirming the order of the Referee in Bankruptcy overruling the trustee's objections to the proofs of the claims of J. A. Fazio and L. C. Ambrose (Lawrence C. Ambrose).

2. The District Court erred in holding that there is substantial evidence in the record to sustain the findings of the Referee in Bankruptcy. In particular the District Court erred in holding that the first, fourth, fifth, sixth, seventh, ninth, tenth and eleventh findings contained therein are supported by the evidence.

3. The District Court erred in not finding that the proofs of the claims of J. A. Fazio and L. C. Ambrose (Lawrence C. Ambrose) if allowed at all, should be subordinated to those of other unsecured creditors.

4. The District Court erred in not finding that the obligations upon which the claims of J. A. Fazio and L. C. Ambrose (Lawrence C. Ambrose) were founded were conditional obligations to pay a debt out of an uncertain fund, which fund never came into existence.

5. The District Court erred in denying the relief prayed for in the Trustee's Objections to the Proofs

of Claims filed by J. A. Fazio and Lawrence C. Ambrose (L. C. Ambrose) herein.

SUMMARY OF THE ARGUMENT.

The two claimants and appellees in this case are controlling shareholders of the bankrupt. These claims arise out of purported loans to themselves at the time the partnership was reorganized as a corporation; that is, at the time of incorporation the partners gave notes to themselves in the approximate value of their original capital contributions to the partnership.

It is the contention of the trustee and appellant that such claims of controlling shareholders should be deferred or subordinated to the claims of outside unsecured creditors where the corporation was thus inadequately or not honestly capitalized. This principle of law has become known as the "Deep Rock Doctrine" since its application by the United States Supreme Court in *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307.

Furthermore, admitted capital contributions cannot, as a matter of law, be later converted into debt obligations by the simple expedient of taking back promissory notes for such capital advances so that the contributors can participate with general unsecured creditors when the business later goes into bankruptcy. To do otherwise would be unfair and inequitable to those creditors.

A final argument against the allowance of appellees' claims is based upon the principle that a conditional obligation to pay a debt out of an uncertain fund does not accrue until the condition is performed. When the testimony is undisputed that the claims of J. C. Fazio and Lawrence C. Ambrose were to be "liquidated out of profits" and when such profits never arise, as was the case here, the claims fall within the above rule and are thus not provable in bankruptcy.

ARGUMENT.

I.

CLAIMS OF CONTROLLING SHAREHOLDERS WILL BE DEFERRED OR SUBORDINATED TO OUTSIDE CREDITORS WHERE A CORPORATION IN BANKRUPTCY HAS NOT BEEN ADEQUATELY OR HONESTLY CAPITALIZED OR HAS BEEN MANAGED TO THE PREJUDICE OF CREDITORS OR TO DO OTHERWISE WOULD BE UNFAIR TO CREDITORS.

"... The courts will scrutinize the good faith and fairness of a transaction by which the controlling shareholders seek to recover a purported loan to themselves in what is their own business in competition with other creditors, and will consider the adequacy of the capital furnished and other circumstances." (Ballantine on Corporations, 2d Ed. Sec. 129, p. 301.)

The question most frequently arises where a parent corporation seeks to recover loans or other claims in the bankruptcy of its subsidiary corporation. Such was the situation in *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307, known as the "Deep Rock" case, and

which name has been generally applied to the above proposition, now referred to as the "Deep Rock Doctrine."

Taylor v. Standard Gas & Electric Co., 306 U.S. 307, 59 Sup. Ct. 543, 83 L. Ed. 699.

Here a subsidiary of Standard, the Deep Rock Oil Corporation, was in bankruptcy proceedings under sec. 77B. In the plan of reorganization Standard sought to recover open account claims along with other creditors and in preference to preferred shareholders. The Court found that Deep Rock had been insufficiently capitalized and held that the claim of the parent should be subordinated to those of other creditors and preferred shareholders because the parent had not provided the debtor corporation with adequate capital and had also engaged in certain abuses of management prejudicial to such creditors. In reversing the lower Courts the Supreme Court (Justice Roberts) made the following observations:

"In the present case there remains an equity after satisfaction of the creditors in which only the preferred stockholders and Standard can have an interest. Equity requires the award to preferred stockholders of a superior position in the reorganized company. (p. 323.)

Deep Rock finds itself bankrupt not only because of the enormous sums it owes Standard but because of the abuses in management due to the paramount interest of interlocking officers and directors in the preservation of Standard's position, as at once proprietor and creditor of Deep Rock. It is impossible to recast Deep Rock's his-

tory and experience so as even to approximate what would be its financial condition at this day had it been adequately capitalized and independently managed and had its fiscal affairs been conducted with an eye single to its own interests. (p. 323.)

If a reorganization is effected, the amount of which Standard's claim is allowed is not important if it is to be represented by stock in the new company, provided the stock to be awarded it is subordinated to that awarded preferred stockholders. No plan ought to be approved which does not accord the preferred stockholders a right of participation in the equity in the company's assets prior to that of Standard, and at least equal voice with Standard in the management. Anything less would be to remand them to precisely the status which has inflicted serious detriment on them in the past." (p. 324.)

Shortly after the *Deep Rock* case the underlying principle was applied by the U.S. Supreme Court to individual stockholders in one-man or close corporations. This arose in *Pepper v. Litton*, 308 U.S. 295; 60 Sup. Ct. 238; 84 L. Ed. 281, in which the Court was dealing with an attempt of an *individual owner of a bankrupt corporation to prove a claim against it as a creditor*. The controlling shareholder's claim was in the form of a confessed judgment of salary claims. The claims had been dormant for five years and the claimant sought to perfect them only when bankruptcy was eminent. In disallowing the claim the Court relied on the *Deep Rock* case and then went on to enunciate in broad terms the fiduciary duties of a controlling

shareholder, violation of which would cause his claim to be subordinated, saying (Justice Douglas):

“That equitable power also exists in passing on claims presented by an officer, director, or stockholder in the bankruptcy proceedings of his corporation. The mere fact that an officer, director, or stockholder has a claim against his bankrupt corporation or that he has reduced that claim to judgment does not mean that the bankruptcy court must accord it *pari passu* treatment with the claims of other creditors. Its disallowance or subordination may be necessitated by certain cardinal principles of equity jurisprudence. A director is a fiduciary. *Twin-Lick Oil Company v. Marbury*, 91 U.S. 587, 588, 23 L.Ed. 328. So is a dominant or controlling stockholder or group of stockholders. *Southern Pacific Company v. Bogert*, 250 U.S. 483, 492, 39 S.Ct. 533, 537, 63 L.Ed. 1099. Their powers are powers in trust. See *Jackson v. Ludeling*, 21 Wall. 616, 624, 22 L.Ed. 492. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. *Geddes v. Anaconda Copper Mining Company*, 254 U.S. 590, 599, 41 S.Ct. 209, 212, 65 L.Ed. 425. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside. * * *

As we have said, the bankruptcy court in passing on allowance of claims sits as a court of

equity. Hence these rules governing the fiduciary responsibilities of directors and stockholders come into play on allowance of their claims in bankruptcy. In the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate. And its duty so to do is especially clear when the claim seeking allowance accrues to the benefit of an officer, director, or stockholder * * * (This result) is reached where the claim asserted is void or voidable because the vote of the interested director or stockholder helped bring it into being or where the history of the corporation shows dominancy and exploitation on the part of the claimant. It is also reached where on the facts the bankrupt has been used merely as a corporate pocket of the dominant stockholder, who, with disregard of the substance or form of corporate management, has treated its affairs as his own. And so-called *loans or advances by the dominant or controlling stockholder will be subordinated to claims of other creditors and thus treated in effect as capital contributions by the stockholder not only in foregoing types of situations but also where the paid-in capital is purely nominal, the capital necessary for the scope and magnitude of the operations of the company being furnished by the stockholder as a loan.*

Though disallowance of such claims will be ordered where they are fictitious or a sham, these cases do not turn on the existence or non-existence of the debt. Rather they involve simply the question of order of payment." (U.S. 306-310.)

The process was carried to its final phase in *Arnold v. Phillips*, 117 F. 2d 479 (C.C.A. 5th, 1941) (cert. den. 313 U.S. 583, 85 L.Ed. 1539), where the principles were applied in the case of an individual shareholder so as to deny him the position of creditor with respect to moneys advanced at the time of the organization of the corporation. This case presented a problem in which the shareholder-creditor had made two series of advances to the corporation. The first series was made at or near the time of incorporation, but the second series was made some four years later during a period of reverses after the company had had two years of prosperity. The corporate charter provided for an original capitalization of \$50,000, but an additional \$70,000 was loaned by the shareholder-creditor for completion of a brewery, which was the corporation's primary asset. Four years later additional advances were made to provide operating capital. On bankruptcy the Court treated the original advances as stock subscriptions or invested capital, following the *Deep Rock* case, but sustained the shareholder's claim with respect to the loans made by him to the corporation subsequent to its organization. In setting aside the creditor's foreclosure sale the Court observed that:

“The two series of advances differ materially as respects their nature and purpose. Those made before the enterprise was launched were, as the district court found, really capital. Although the charter provided for no more capital than \$50,000, what it took to build the plant and equip it was a permanent investment, in its nature capital. There was no security asked or given. Arnold saw

that he could not proceed with his enterprise unless he enlarged the capital. There can be little doubt that what he contributed to the plant was actually intended to be capital, notwithstanding the charter was not amended and demand notes were taken. The district court was justified in concluding as a matter of fact that the advances during the first year were capital, a sort of interest-bearing redeemable stock; and that as a matter of law these contributions could not, as against corporate creditors, either precedent or subsequent, be turned into secured debts by afterwards taking and recording a trust deed to secure them. There was no debt to be secured.” (117 F.2d 497.)

In passing the Court also observed that in such situations the federal bankruptcy law, rather than state law, is controlling.

While inadequate capitalization is ordinarily accompanied by some other types of mismanagement it is, of itself, sufficient to warrant subordination. It has been observed that judicial disapproval of the inadequately capitalized concern did not commence with the *Deep Rock* case. Even before, bankruptcy and equity receivership Courts were refusing a creditor's status to the creator of a corporation who put in venture capital predominately in the form of creditor obligations. (See 42 Col. L. Rev. 1124 at 1129 and cases cited therein; *Carter v. Bogden*, 13 F. 2d 90; *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499, 48 P. 333.)

II.

A PROMISE TO PAY A NOTE OUT OF AN UNCERTAIN FUND SUCH AS PROFITS OR NET INCOME DOES NOT ACCRUE UNTIL THE EVENT TAKES PLACE AND ACCORDINGLY IS NOT PROVABLE IN BANKRUPTCY.

It is the law of both California and in bankruptcy that a *promise* to pay a debt out of an uncertain fund, such as profits or income to be earned, is conditioned, and no cause of action accrues thereon until the condition is performed. Accordingly, such a claim is not provable in bankruptcy if the fund never arises or condition never takes place.

Thompson v. England (1955 9th Cir.), 226 F. 2d 488 bears out this point. Appellant loaned her husband, the bankrupt, \$12,000 of her separate property to be repaid from the proceeds of his business "as soon as said business is in sound financial position." The business never succeeded and following bankruptcy appellant filed her claim for the amount of the loan. In confirming the Referee in Bankruptcy's order disallowing appellant's claim the Court said:

"Several federal cases have held that bankruptcy does not anticipatorily breach a contract where the liability is contingent on the existence of a fund or profits. In California where one promises to pay when able, essentially the promise here, the obligation does not arise until the debtor is able to pay and there is no duty or obligation to create such ability." (pp. 491-492.)

And similarly in *In re The Literary Digest* (1939, 2nd Cir.), 105 F. 2d 957, the Court said:

“It is conceded that a promise to pay out of an uncertain fund, such as income to be earned, creates no claim provable in bankruptcy, if the fund never arises. *Synnott v. Tombstone Consolidated Mines Co.*, 9 Cir., 208 F. 251; *In re 35% Automobile Supply Co.*, D.C., 247 F. 377; *G. B. McAbee Powder & Oil Co. v. Penn-American Gas Coal Co.*, D. C., 19 F.2d 151” (p. 959).

See also:

Horacek v. Smith (1948), 33 Cal. 2d 186, 199 F. 2d 929;

Van Buskirk v. Kuhns (1913), 164 Cal. 472, 129 P. 587, 44 L.R.A., N.S., 710.

In the matter of Leonard Plumbing & Heating Supply, Inc. it was testified by Mr. Robert H. Laborde, accountant for the bankrupt, that the business was changed from a partnership into a corporation at his suggestion as a tax savings or tax protection device (TR pp. 150-152); that he recommended the creation of the promissory notes in favor of J. A. Fazio and L. C. Ambrose, claims for which the trustee in bankruptcy now protests. (TR p. 150.) He further testified that these notes were to be paid *out of the profits of the business*, if and when such profits arose. (TR pp. 170, 173-174.) It is conceded that there were no profits out of which such claims could have been paid. Accordingly, the notes which form the basis of the claims of J. A. Fazio and L. C. Ambrose fall within the above rule and are not provable in bankruptcy.

CONCLUSION.

In conclusion, the Trustee urges that the order of the District Court affirming the referee's order be reversed with directions that the claims of J. A. Fazio and Lawrence C. Ambrose be either subordinated to those of the other general creditors under the Deep Rock Doctrine and succeeding cases noted above, or that they be entirely disallowed under the doctrine that such claims, being conditioned upon the existence of an uncertain fund or event, are not provable in bankruptcy under the line of cases noted immediately above.

Dated, San Francisco, California,
August 30, 1957.

Respectfully submitted,

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No. 15587

United States
Court of Appeals
for the Ninth Circuit

JOHN COSTELLO, Trustee in Bankruptcy of
Leonard Plumbing and Heating Supply, Inc.,
bankrupt, Appellant,

vs.

J. A. FAZIO and LAWRENCE C. AMBROSE,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

AUG - 5 1957

PAUL P. O'BRIEN, CLERK

No. 15587

United States
Court of Appeals
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JOHN COSTELLO, Trustee in Bankruptcy of
Leonard Plumbing and Heating Supply, Inc.,
bankrupt, Appellant,

vs.

J. A. FAZIO and LAWRENCE C. AMBROSE,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

THE HISTORY OF

THE CITY OF

NEW-YORK

FROM 1624 TO 1824

BY JOHN E. BOWEN, ESQ. OF NEW-YORK.

NEW-YORK: PUBLISHED BY J. BOWEN, 1824.

THE HISTORY OF

THE CITY OF

NEW-YORK

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Appeal:

Certificate of Clerk to Transcript of Record on	41
Designation of Record on (USCA).....	180
Notice of	40
Statement of Points on (USCA).....	178
Certificate of Clerk to Transcript of Record...	41
Certificate on Petition for Review, Referee's..	3
Designation of Record on Appeal (USCA)....	180
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	40
Objections of Trustee to Proof of Claim Filed by:	
Lawrence C. Ambrose.....	21
J. A. Fazio.....	17
Order Affirming Referee's Order.....	40
Order Extending Time to File Petition for Review	30

ii.

Order Overruling Trustee's Objections to Proofs of Claim of J. A. Fazio and L. C. Ambrose	24
Petition for Review.....	31
Proof of Claim of J. A. Fazio.....	12
Proof of Claim of Lawrence C. Ambrose.....	16
Statement of Points on Which Appellant In- tends to Rely (USCA).....	178
Transcript of Proceedings and Testimony.....	43
Witness for Claimant Fazio:	
Laborde, Robert H.	
—direct	168
—cross	174
Witnesses for Objecting Trustee:	
Ambrose, Laurence C. (21j)	
—direct	51
—cross	67
—redirect	71
Curran, John S.	
—direct	131
—voir dire	133
Fazio, J. A. (21j)	
—direct	47
Heimbucher, Clifford V.	
—direct	81, 93
—cross	104
—redirect	112

Transcript of Proceedings—(Continued):

Witnesses for Objecting

Trustee—(Continued):

Laborde, Robert H. (21-j)

—direct 139

—redirect 164

Logan, William B.

—direct113, 123

—voir dire 118

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In the Southern Division of the United States District Court, Northern District of California

No. 43763—In Bankruptcy

In the Matter of

LEONARD PLUMBING AND HEATING SUPPLY, INC., a California corporation.

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF ORDER OVERRULING
TRUSTEE'S OBJECTIONS TO PROOFS
OF CLAIM OF J. A. FAZIO AND L. C.
AMBROSE

The undersigned, one of the Referees in Bankruptcy to whom the above-entitled proceedings has been duly referred, in accordance with the provisions of Section 39(c) of the Bankruptcy Act, hereby certifies as follows:

Statement of Proceedings

The above-entitled proceedings were commenced on the 8th day of October, 1954 by the filing herein of a voluntary petition in bankruptcy, upon which an Order of adjudication and reference to the undersigned was herein made on or about said date. Thereafter, and within the time allowed by law, therefor, one J. A. Fazio and one L. C. Ambrose filed herein their Proofs of Claim in the respective sums of \$34,147.55 and \$7,871.17. Thereafter, and on or about the 20th day of December, 1955, said Trus-

tee filed herein his Objections to the said Proofs of Claim filed herein by said J. A. Fazio and L. C. Ambrose, wherein said Trustee prayed that this Court decree the claims of said creditors to be inferior in right to the interests of the other general unsecured creditors of the above-named Bankrupt in any distribution to unsecured creditors of the assets of said Bankrupt in these proceedings.

Thereafter, upon due notice of the hearing of said Trustee's Objections to the said claims, hearings were had thereon before the undersigned Referee in Bankruptcy on the 17th day of January, 1956, on the 25th day of January, 1956, and on the 13th day of February, 1956. At said hearings, Claimant J. A. Fazio was represented by Messrs. Shapro & Rothchild (Arthur P. Shapro, Esq., appearing), his attorneys, and said L. C. Ambrose was represented by Hon Chew, Esq., his attorney, and said Trustee was represented by Messrs. Francis P. Walsh and Stuart R. Dole.

Evidence, both oral and documentary, was introduced by the respective parties upon the issues so joined, as per Reporter's Transcript thereof, pages 1-137, both inclusive, which is herewith transmitted. Thereupon, said issues were ordered submitted to the undersigned for decision upon briefs to be submitted by counsel for the respective parties, which said briefs were so submitted, and after full consideration thereof and of the record before the Court, the undersigned Referee in Bankruptcy made and filed herein the following Findings of Fact:

I.

That at and before the filing of the petition for adjudication in bankruptcy herein, the above-named Bankrupt was and is justly and truly indebted to said Claimants in the respective sums of \$34,147.55 and \$7,871.17 for the considerations set forth, respectively, in said Proofs of Claim.

II.

That said Claimants were at said time and at all times from and after the first day of October, 1952 each the owners of one-third ($\frac{1}{3}$) of the issued and outstanding capital stock of the above-named bankrupt corporation, and were, respectively, the President and Secretary-Treasurer and Directors of said corporation.

III.

That to and including the 30th day of September, 1952, the business of "Leonard Plumbing and Heating Supply Co." was a co-partnership composed of said Claimants and one B. T. Leonard and that the same type of business was conducted by said partnership at the same location where and which said bankrupt corporation conducted its business.

IV.

That the Promissory Notes upon which said Proofs of Claim are predicated were issued by said corporation in lieu of all of the capital investment of said Claimants in said partnership, saving and excepting the sum of \$2,000.00 each; and that, pursuant to a Permit therefor issued by the Commis-

sioner of Corporations of the State of California under date of January 20, 1953, all of the assets of the aforesaid co-partnership of Leonard Plumbing and Heating Supply Co., were acquired by the above-named Bankrupt in consideration of the issuance by said bankrupt corporation of 200 shares of its capital stock each to said Claimants and to said B. T. Leonard, subject to liabilities of said co-partnership in the aggregate sum of \$162,162.22, together with such additional liabilities as may have been incurred after September 30, 1952 by said partnership in the ordinary course of business to the date of the transfer of its assets to said corporation, and that the net worth of the assets so transferred by said co-partnership to said Bankrupt at the time of such transfer was no less than the stated value, to-wit: \$6,000.00 of the shares of stock so issued as part of the consideration therefor.

V.

That said bankrupt corporation was organized by said Claimants and by said B. T. Leonard and said transfer of the assets of said co-partnership to said bankrupt corporation was made in good faith and for a fair and valuable consideration, and that at the time of said transfer of the assets of said co-partnership, subject to its liabilities as aforesaid, neither said co-partnership nor said corporation were insolvent.

VI.

That the paid-in stated capital of said bankrupt corporation was at the time of its acquisition of the

assets of said partnership, subject to its liabilities as aforesaid, adequate, under all of the facts and circumstances attending same for the continued operation of the plumbing supply business theretofore operated by said co-partnership and thereafter operated by said bankrupt corporation.

VII.

That although Claimants by virtue of their ownership of the said aggregate of $66\frac{2}{3}\%$ of the issued and outstanding capital stock of the bankrupt corporation and their appointment and activities as constituting a majority of the Board of Directors of said bankrupt corporation controlled and dominated the said corporation and its affairs, they did not mismanage the said business or any part thereof, nor did said Claimants, or either of them, by any of their acts, separately or jointly, practice upon said bankrupt corporation, its other stockholder and/or any of its creditors any fraud or deception, whatever, nor did they act in connection with said corporation or the issuance to them of the Promissory Notes upon which their said Proofs of Claim on file herein are predicated to the detriment of said bankrupt corporation, its other stockholder or any of its creditors for their own personal or private benefit, or otherwise, or at all.

VIII.

That at the time of the commencement of the above-entitled proceedings, said bankrupt corporation was not indebted to any creditors whose obliga-

tions were incurred by the said pre-existing co-partnership known as "Leonard Plumbing and Heating Supply Co.", saving and excepting to the extent that the Promissory Notes upon which the said Proofs of Claim herein filed by Claimants are predicated represented, as aforesaid, a part of the capital of the said co-partnership as of the closing of business on the 30th day of September, 1952.

IX.

That it is not true, as alleged in said Trustee's Objections, that the incorporation of the bankrupt and the issuance to Claimants of the Promissory Notes in question, or either of them, was a part of any scheme or plan to place Claimants, as such co-partners, in the same class as the unsecured creditors of said partnership.

X.

That the sum of \$1,250.00 was and is a reasonable sum to be allowed to the attorneys for Claimant, J. A. Fazio, in connection with the Alameda County Superior Court action No. 258062.

XI.

That the Promissory Notes upon which the said Proofs of Claim herein filed by Claimants are predicated were not, nor were any of them, intended to be by the parties thereto, nor were they, promises to pay the respective amounts thereof from any specific or any uncertain fund.

Wherefrom, the undersigned concluded:

I.

That in the procurement of the Promissory Notes upon which the Proofs of Claim herein filed by Claimants are predicated, said Claimants acted in all respects in good faith and took no unfair advantage of either the bankrupt corporation, its other stockholder, or any of its then existing or subsequent creditors, and that said Claimants and each of them are therefore entitled to participation on a pro-rata basis in the assets of the estate of the above-named bankrupt with all other general and wholly unsecured creditors on file, approved and allowed herein.

Opinion

Upon the basis of the record as aforesaid, the Findings of Fact, and Conclusions of Law, the undersigned Referee in Bankruptcy felt that no legal or equitable showing had been made by the Trustee sufficient, after weighing the mass of conflicting evidence upon the issues so joined, to sustain his said Objections and to justify the subordination of the claims of said J. A. Fazio and L. C. Ambrose to those of the other general and wholly unsecured creditors whose claims are on file, approved and allowed herein.

The undersigned Referee in Bankruptcy thereupon, on the 28th day of August, 1956, made and entered herein that certain "Order Overruling Trustee's Objections to Proofs of Claim of J. A. Fazio and L. C. Ambrose," to which said Trustee timely filed his said Petition for Review, and to which said Petition for Review is properly an-

nexed, as required by Section 39(c) of the Bankruptcy Act a full, true and correct copy of the said Order of the undersigned above referred to.

Comments on Petition for Review

Contrary to the observations of the Trustee in his Petition for Review, the evidence that the claims of J. A. Fazio and L. C. Ambrose were to be "liquidated out of the profits" was not only not uncontradicted but, in the opinion of the undersigned, was not so limited.

In considering the weight of the evidence as to the alleged inadequacies of the capital of the bankrupt corporation, the undersigned Referee in Bankruptcy took into consideration not only the testimony of the Trustee's expert witnesses (Messrs. Curran, Heinbucher, and Logan), but also the testimony of the Claimants' expert witness (Mr. LaBorde), and resolved that conflict in favor of the Claimants.

Also contrary to the observations of the Trustee in his Petition for Review, the evidence adduced at the hearing was not uncontradicted but was, in fact, highly controversial on the subject of the purpose of the incorporation of the pre-existing partnership and there was, in the opinion of the undersigned, no substantial evidence to justify a finding that the organization of the bankrupt corporation was for "the sole purpose" of the co-partnership, in setting up the corporation to take over the assets and liabilities of the co-partnership, was to provide a means by which the Claimants, J. A. Fazio and L. C. Am-

brose, were to share pro-rata in the assets of the corporation in the event of liquidation or bankruptcy.

The evidence on the subject of the alleged inadequacies of the paid-in stated capital of the bankrupt corporation was likewise, contrary to the observations of the Trustee in his Petition for Review, not uncontradicted but was highly controversial and carefully considered and weighed by the undersigned. Lastly, contrary to the other observations made by said Trustee in his said Petition for Review, all of the findings of fact made by the undersigned Referee in Bankruptcy in the premises were based upon, as the transcript will show, conflicting evidence.

Dated at Oakland in said District this 6th day of February, 1957.

Respectfully submitted,

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

Original Documents Transmitted
With This Certificate

1. Proof of Claim filed herein by J. A. Fazio in the sum of \$34,147.55.
2. Proof of Claim filed herein by L. C. Ambrose in the sum of \$7,871.17.
3. Trustee's Objections (filed herein on December 20, 1956) to Proof of Claim filed by J. A. Fazio.
4. Trustee's Objections (filed herein on December 30, 1956) to Proof of Claim filed by L. C. Ambrose.

5. (Trustee's) Opening Memorandum of Points and Authorities.

6. Claimants' Reply Memorandum of Points and Authorities.

7. Trustee's Closing Memorandum of Points and Authorities.

8. Letter dated June 13, 1956 from attorneys for J. A. Fazio to Referee commenting on Trustee's Closing Memorandum of Points and Authorities.

9. Order Overruling Trustee's Objections to Proof of Claim of J. A. Fazio and L. C. Ambrose (filed August 28, 1956).

10. Order Extending Time to File Petition for Review dated September 4, 1956.

11. (Trustee's) Petition for Review.

12. Reporter's Transcript (Index Pgs. I and II), pp. 1-137, both inclusive.

13. Trustee's Exhibits Nos. 1-5, both inclusive.

14. Claimants' Exhibits Nos. 1-5, both inclusive.

[Endorsed]: Filed Feb. 7, 1957.

[Title of District Court and Cause.]

PROOF OF CLAIM AND LETTER OF ATTORNEY

State of California,

City and County of San Francisco—ss.

J. A. Fazio, of Oakland in the County of Alameda, and State of California, personally known to me, being by me duly sworn, deposes and says:

* * * * *

That Leonard Plumbing & Heating Supply, Inc., the above named bankrupt, by or against whom a petition for adjudication of bankruptcy or for an arrangement or for reorganization has been filed, was at and before the filing of such petition and still is justly and truly indebted or liable to claimant in the sum of \$34,147.55.

That the consideration of said debt or liability is as follows:

Balance owing on Promissory Note, was for value, made, executed and delivered by Bankrupt to Claimant under date of October 1, 1952 in the original sum of \$41,169.61, original of which said Promissory Note is attached hereto, marked Exhibit "A," and hereby expressly referred to and made part hereof. Plus reasonable attorney's fees incurred in Alameda County Superior Court action No. 258062 in the sum of \$1,250.00.

That the items of said debt became due upon the dates as respectively set forth upon said Promissory Note marked "Exhibit A."

(b) That the instrument upon which said debt or liability is founded is attached hereto and marked Exhibit "A".

That no part of said debt or liability has been paid; that there are no set-offs or counterclaims to the same; that no note or other negotiable instrument has been received for said account or any part thereof (except the note.... hereto attached as Exhibit "B") and that no judgment has been rendered thereon (except as hereinabove set forth).

That claimant does not hold, and has not, nor has any person, by his or its order, or to deponent's knowledge or belief, for claimant's use, had or received, any security or securities for said debt or liability except as disclosed herein.

This claim is free from usury as defined by the laws of the State where the debt was contracted.

Claimant also herewith authorizes Arthur P. Shapro and August B. Rothschild, or any one of them, with full power of substitution, to attend all meetings of creditors of the bankrupt or debtor aforesaid and all adjournments thereof at the places and times appointed by the court, and for claimant and in his or its name to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress relating to bankruptcy, to vote for a trustee or trustees of the estate of said bankrupt or debtor, and for a committee of creditors, to accept any arrangement or wage earner's plan proposed by said bankrupt or debtor, and to receive payment of dividends and payment or delivery of money or of other consideration due claimant under such arrangement, reorganization, or wage earner's plan and for any other purpose in claimant's interest whatsoever, and with like powers to attend and vote at any other meeting or meetings of creditors or sitting or sittings of the court which may be held therein for any of the purposes aforesaid, and to receive or waive any of the notices required by section 58 of the Bankruptcy Act, and claimant does hereby revoke all letters of attorney heretofore given by claimant in this matter.

In witness whereof, and with the intention of having one individual signature suffice for the above deposition and this letter of attorney, said claimant has hereunto subscribed his name, or, if a corporation, has caused such subscription to be made by said officer or agent as its corporate act, or, if a partnership, has caused such subscription to be made by said member thereof on its behalf, or, if an individual or partnership acting through an agent or attorney, has caused such subscription to be made by such attorney or agent as the act of said principal, this 16th day of March, 1955.

/s/ J. A. FAZIO

Subscribed, sworn to and acknowledged before me this 16th day of March, 1955.

[Seal] /s/ FRANCES R. WIENER,

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires Feb. 17, 1958.

EXHIBIT "A"

\$41,169.61—Oakland, California, October 1, 1952

On Demand for value received, I (or we, jointly or severally) promise to pay to the order of J. A. Fazio at Oakland, California, the sum of Forty-one thousand, one hundred sixty-nine and 61/100 Dollars in lawful money of the United States of America, with interest from—No interest—at the rate of per cent per annum until paid, payable on and thereafter, in like lawful money, and if not paid as it becomes due,

to be added to the principal and become a part thereof and to bear interest at the same rate.

In the event of commencement of suit to enforce payment of this note, the undersigned jointly and severally agree to pay such additional sum as attorney's fees as the Court may adjudge reasonable.

[Seal] LEONARD PLUMBING & HEATING SUPPLY, INC.

/s/ J. A. FAZIO,

/s/ B. T. LEONARD,

/s/ LAWRENCE C. AMBROSE.

[Endorsed]: Filed March 18, 1955.

[Title of District Court and Cause.]

PROOF OF CLAIM IN BANKRUPTCY

State of California,
County of Alameda—ss.

Lawrence C. Ambrose, of No. 130 Crestview Street, Orinda, County of Contra Costa, State of California, being duly sworn, deposes and says:

* * * * *

2. That the above-named bankrupt (or debtor) was at and before the filing by (or against) him of the petition herein (for adjudication of bankruptcy), and still is, justly and truly indebted (or liable) to said deponent (or copartnership or corporation), in the sum of Seven thousand eight hundred seventy-one dollars and 17/100 (\$7,871.17).

3. That the consideration of said debt (or liability) is as follows: Money loaned to company.

4. That no part of said debt (or liability) has been paid except; none.

5. That there are no set-offs or counterclaims to said debt (or liability), except; none.

6. That deponent (or said copartnership or said corporation) does not hold, and has not, nor has any person by his (or its) order, or to deponent's knowledge or belief, for his (or its) use, had or received, any security or securities for said debt (or liability), except; none.

* * * * *

9. This claim is filed as an Unsecured Claim.

/s/ LAWRENCE C. AMBROSE

Subscribed and sworn to before me this 28th day of March, 1955.

[Seal] /s/ MARGARET ROBINSON,

My Commission Expires Aug.
12, 1957.

[Endorsed]: Filed March 28, 1955.

[Title of District Court and Cause.]

TRUSTEE'S OBJECTIONS TO PROOF OF CLAIM FILED BY J. A. FAZIO

Now comes John Costello, the duly appointed, qualified and acting trustee of the estate of the above named bankrupt, and objects to the allowance by this Court of that certain proof of claim heretofore filed herein on the 18th day of March, 1955, by J. A. Fazio, being Referee's Claim No. 142, on the following grounds:

That said bankrupt corporation, or the estate of said bankrupt corporation, was not, at or before the filing of the voluntary petition for adjudication herein, and is not now, justly or truly indebted to said claimant in the sum of \$34,147.55, as set forth in said alleged claim filed herein by said claimant, or in any other sum or at all, and the trustee calls for proof on the part of said claimant to substantiate said claim pursuant to these objections.

As and for a second, separate and distinct objection to the allowance of said claim, said trustee alleges that said claimant J. A. Fazio has been a stockholder of the above named bankrupt corporation since it was organized on or about the 30th day of September, 1952, and still continues to be a stockholder thereof, owning thirty-three and one-third per cent ($33\frac{1}{3}\%$) of the outstanding capital stock of said bankrupt corporation; that at all times since said bankrupt corporation was incorporated said claimant was and now is the duly elected and acting Director and President of said corporation.

That prior to the time said bankrupt was incorporated, Leonard Plumbing & Heating Supply, Inc., was a copartnership composed of B. T. Leonard, Lawrence C. Ambrose and J. A. Fazio, claimant herein, under the firm name of "Leonard Plumbing & Heating Supply Co."; that the same type of business was conducted by said copartnership at the same location where said bankrupt corporation conducted its business.

That the amount set forth in the claim filed by the said J. A. Fazio, claimant herein, represented

a portion of the capital investment in said copartnership; that at the time said bankrupt was incorporated all of the capital investment, including that of the said J. A. Fazio, was converted from partnership capital account to an account entitled "Loans from Copartners"; that, in truth and in fact, this transaction was a scheme and plan to place said copartners in the same class as the unsecured creditors of said copartnership and the bankrupt corporation thereafter organized to take over the assets and liabilities of said copartnership; that if said claimant is permitted to share in the assets of said bankrupt now in the hands of the trustee, in the same parity with general unsecured creditors, he will receive a portion of the capital invested which should be used to satisfy the claims of creditors before any capital investment can be returned to the owners and stockholders of said bankrupt.

As and for a third, separate and distinct objection to the allowance of said claim, said trustee denies that said claimant is entitled to the sum of \$1,250.00, or any other sum or at all, for reasonable attorneys' fees incurred in Alameda County Superior Court Action No. 258062, or in any other court action.

That for the reasons above set forth, the claim of J. A. Fazio should be subordinated to the claim of general unsecured creditors of said bankrupt corporation.

Wherefore, John Costello, as trustee of said

Leonard Plumbing & Heating Supply, Inc., a California corporation, bankrupt, prays:

(1) That due notice be given to J. A. Fazio, claimant herein, of the hearing of said objections and that upon said hearing claimant be directed to attend.

(2) That after a hearing on said objections, an order be made and entered sustaining said objections and disallowing said claim filed by the said J. A. Fazio.

(3) That said claim of J. A. Fazio be decreed to be inferior in right to the interests of the general unsecured creditors of Leonard Plumbing & Heating Supply, Inc., a corporation, bankrupt, in any distribution of the assets of said bankrupt in said bankruptcy proceedings.

(4) For such other and further relief as to the Court may seem just and proper in the premises.

/s/ JOHN COSTELLO,

Trustee.

FRANCIS P. WALSH &
HENRY GROSS,
JAMES M. CONNERS,
STUART R. DOLE,

/s/ By FRANCIS P. WALSH,
Attorneys for Trustee.

Duly Verified.

[Endorsed] : Filed Dec. 20, 1955.

[Title of District Court and Cause.]

**TRUSTEE'S OBJECTIONS TO PROOF OF
CLAIM FILED BY LAWRENCE C. AM-
BROSE**

Now comes John Costello, the duly appointed, qualified and acting trustee of the estate of the above named bankrupt, and objects to the allowance by this Court of that certain proof of claim heretofore filed herein on the 28th day of March, 1955, by Lawrence C. Ambrose, being Referee's Claim No. 144, on the following grounds:

That said bankrupt corporation, or the estate of said bankrupt corporation, was not, at or before the filing of the voluntary petition for adjudication herein, and is not now, justly or truly indebted to said claimant in the sum of \$7,871.17, as set forth in the alleged claim filed herein by said claimant, or in any other sum, or at all, and the trustee calls for proof on the part of said claimant to substantiate said claim pursuant to these objections.

As and for a second, separate and distinct objection to the allowance of said claim, said trustee alleges that said claim does not show, nor can it be ascertained therefrom, how, or in what manner, the amount set forth therein was arrived at.

As and for a third, separate and distinct objection to the allowance of said claim, said trustee alleges that said claim has not been executed in accordance with the provisions of the Bankruptcy Act.

As and for a fourth, separate and distinct ob-

jection to the allowance of said claim, said trustee alleges as follows:

That said claimant Lawrence C. Ambrose has been a stockholder of the above named bankrupt corporation since it was organized on or about the 30th day of September, 1952, and still continues to be a stockholder thereof, owning thirty-three and one-third per cent ($33\frac{1}{3}\%$) of the outstanding capital stock of said bankrupt corporation; that at all times since said bankrupt corporation was incorporated said claimant was and now is the duly elected and acting Director and Secretary of said corporation.

That prior to the time said bankrupt was incorporated, Leonard Plumbing & Heating Supply, Inc., was a copartnership composed of J. A. Fazio, B. T. Leonard and Lawrence C. Ambrose, claimant herein, doing business under the firm name of "Leonard Plumbing & Heating Supply Co."; that the same type of business was conducted by said copartnership at the same location where said bankrupt corporation conducted its business.

That the amount set forth in the claim filed by the said Lawrence C. Ambrose, claimant herein, represented a portion of the capital investment in said copartnership; that at the time said bankrupt was incorporated all of the capital investment, including that of the said Lawrence C. Ambrose, was converted from partnership capital account to an account entitled "loans from copartners"; that, in truth and in fact, this transaction was a scheme and plan to place said copartners in the same class

as the unsecured creditors of said copartnership and the bankrupt corporation thereafter organized to take over the assets and liabilities of said copartnership; that if said claimant is permitted to share in the assets of said bankrupt now in the hands of the trustee, in the same parity with general unsecured creditors, he will receive a portion of the capital invested which should be used to satisfy the claims of creditors before any capital investment can be returned to the owners and stockholders of said bankrupt.

That for the reasons above set forth, the claim of Lawrence C. Ambrose should be subordinated to the claims of general unsecured creditors of said bankrupt corporation.

Wherefore, John Costello, as trustee of said Leonard Plumbing & Heating Supply, Inc., a California corporation, bankrupt, prays:

(1) That due notice be given to Lawrence C. Ambrose, claimant herein, of the hearing of said objections and that upon said hearing claimant be directed to attend.

(2) That after a hearing on said objections, an order be made and entered sustaining said objections and disallowing said claim filed by the said Lawrence C. Ambrose.

(3) That said claim of Lawrence C. Ambrose be decreed to be inferior in right to the interests of the general unsecured creditors of Leonard Plumbing & Heating Supply, Inc., a corporation, bank-

rupt, in any distribution of the assets of said bankrupt in said bankruptcy proceedings.

(4) For such other and further relief as to the Court may seem just and proper in the premises.

/s/ JOHN COSTELLO,

Trustee.

FRANCIS P. WALSH &

HENRY GROSS,

JAMES M. CONNERS,

STUART R. DOLE,

/s/ By FRANCIS P. WALSH,

Attorneys for Trustee.

Duly Verified.

[Endorsed]: Filed Dec. 20, 1955.

[Title of District Court and Cause.]

ORDER OVERRULING TRUSTEE'S OBJEC-
TIONS TO PROOFS OF CLAIM OF J. A.
FAZIO AND L. C. AMBROSE

The duly verified Objections heretofore filed herein by John Costello, Trustee of the above estate, to the Proofs of Claim heretofore filed herein by J. A. Fazio and L. C. Ambrose in the respective sums of \$34,147.55 and \$7,871.17, having regularly come on for hearing before the above-entitled Court on the 17th day of January, 1956, on the 25th day of January, 1956, and on the 13th day of February, 1956, said Claimants being represented by, respectively, Messrs. Shapro & Rothschild (Arthur

P. Shapro, Esq., appearing), and Hon Chew, Esq., their attorneys, and said Trustee being represented by Messrs. Francis P. Walsh, Esq., and Stuart R. Dole, Esq., his attorneys, and evidence, both oral and documentary, having been adduced by the respective parties upon the issues so joined, and the matter having been duly argued by counsel for the respective parties and submitted to the Court for decision, and the Court being fully advised in the premises Finds:

I.

That at and before the filing of the petition for adjudication in bankruptcy herein, the above-named Bankrupt was and is justly and truly indebted to said Claimants in the respective sums of \$34,147.55 and \$7,871.17 for the considerations set forth, respectively, in said Proofs of Claim.

II.

That said Claimants were at said time and at all times from and after the first day of October, 1952 each the owners of one-third ($\frac{1}{3}$) of the issued and outstanding capital stock of the above-named bankrupt corporation, and were, respectively, the President and Secretary-Treasurer and Directors of said corporation.

III.

That to and including the 30th day of September, 1952, the business of "Leonard Plumbing and Heating Supply Co." was a copartnership composed of said Claimants and one B. T. Leonard and that the same type of business was conducted by said

partnership at the same location where and which said bankrupt corporation conducted its business.

IV.

That the Promissory Notes upon which said Proofs of Claim are predicated were issued by said corporation in lieu of all of the capital investment of said Claimants in said partnership, saving and excepting the sum of \$2,000.00 each; and that, pursuant to a Permit therefor issued by the Commissioner of Corporations of the State of California under date of January 20, 1953, all of the assets of the aforesaid co-partnership of Leonard Plumbing and Heating Supply Co., were acquired by the above-named Bankrupt in consideration of the issuance by said bankrupt corporation of 200 shares of its capital stock each to said Claimants and to said B. T. Leonard, subject to liabilities of said co-partnership in the aggregate sum of \$162,162.22, together with such additional liabilities as may have been incurred after September 30, 1952 by said partnership in the ordinary course of business to the date of the transfer of its assets to said corporation, and that the net worth of the assets so transferred by said co-partnership to said Bankrupt at the time of such transfer was no less than the stated value, to-wit: \$6,000.00 of the shares of stock so issued as part of the consideration therefor.

V.

That said bankrupt corporation was organized by said Claimants and by said B. T. Leonard and

said transfer of the assets of said co-partnership to said bankrupt corporation was made in good faith and for a fair and valuable consideration, and that at the time of said transfer of the assets of said co-partnership, subject to its liabilities as aforesaid, neither said co-partnership nor said corporation were insolvent.

VI.

That the paid-in stated capital of said bankrupt corporation was at the time of its acquisition of the assets of said partnership, subject to its liabilities as aforesaid, adequate, under all of the facts and circumstances attending same for the continued operation of the plumbing supply business theretofore operated by said co-partnership and thereafter operated by said bankrupt corporation.

VII.

That although Claimants by virtue of their ownership of the said aggregate of $66\frac{2}{3}\%$ of the issued and outstanding capital stock of the bankrupt corporation and their appointment and activities as constituting a majority of the Board of Directors of said bankrupt corporation controlled and dominated the said corporation and its affairs, they did not mismanage the said business or any part thereof, nor did said Claimants, or either of the, by any of their acts, separately or jointly, practice upon said bankrupt corporation, its other stockholder and/or any of its creditors any fraud or deception whatever, nor did they act in connection with said corporation or the issuance to them of the Promis-

sory Notes upon which their said Proofs of Claim on file herein are predicated to the detriment of said bankrupt corporation, its other stockholder or any of its creditors for their own personal or private benefit, or otherwise, or at all.

VIII.

That at the time of the commencement of the above-entitled proceedings, said bankrupt corporation was not indebted to any creditors whose obligations were incurred by the said pre-existing co-partnership known as "Leonard Plumbing and Heating Supply Co.," saving and excepting to the extent that the Promissory Notes upon which the said Proofs of Claim herein filed by Claimants are predicated represented, as aforesaid, a part of the capital of the said co-partnership as of the closing of business on the 30th day of September, 1952.

IX.

That it is not true, as alleged in said Trustee's Objections, that the incorporation of the bankrupt and the issuance to Claimants of the Promissory Notes in question, or either of the, was a part of any scheme or plan to place Claimants, as such co-partners, in the same class as the unsecured creditors of said partnership.

X.

That the sum of \$1,250.00 was and is a reasonable sum to be allowed to the attorneys for Claimant, J. A. Fazio, in connection with the Alameda County Superior Court action No. 258062.

XI.

That the Promissory Notes upon which the said Proofs of Claim herein filed by Claimants are predicated were not, nor were any of them, intended to be by the parties thereto, nor were they, promises to pay the respective amounts thereof from any specific or any uncertain fund.

Wherefrom, the Court Concludes:

I.

That in the procurement of the Promissory Notes upon which the Proofs of Claim herein filed by Claimants are predicated, said Claimants acted in all respects in good faith and took no unfair advantage of either the bankrupt corporation, its other stockholder, or any of its then existing or subsequent creditors, and that said Claimants and each of them are therefore entitled to participation on a pro-rata basis in the assets of the estate of the above-named bankrupt with all other general and wholly unsecured creditors on file, approved and allowed herein, and good cause appearing therefor,

It Is Hereby Ordered that the said Objections heretofore interposed herein by said John Costello, as Trustee of the estate of the above-named Bankrupt, to the said Proofs of Claim heretofore filed herein by said J. A. Fazio and L. C. Ambrose in the respective sums of \$34,147.55 and \$7,871.17 be and the same are hereby overruled and that said claims, and each of them, be and they are hereby allowed, as filed, as general and wholly unsecured claims

against said estate, for pro-rata participation as such in the assets of said estate.

Dated at Oakland in said District this 28th day of August, 1956.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed Aug. 28, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
PETITION FOR REVIEW

Good Cause Appearing Therefor,

It Is Hereby Ordered that John Costello, trustee of the estate of Leonard Plumbing & Heating Supply, Inc., a California corporation, the above named bankrupt, may have to and including the 4th day of October, 1956, within which to file his petition, as such trustee, to review the order of the Hon. Bernard J. Abrott, Referee in Bankruptcy in the above entitled matter, dated the 28th day of August 1956, overruling the trustee's objections to the proofs of claims of J. A. Fazio and L. C. Ambrose.

Dated: September 4th, 1956.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed Sept. 4, 1956.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To The Honorable Bernard J. Abrott, Referee in
Bankruptcy of the above-entitled Court, at Oak-
land, California:

The petition of John Costello, the duly appointed, qualified and acting trustee of Leonard Plumbing and Heating Supply, Inc., a California corporation, the above-named Bankrupt, respectfully represents:

I.

That your petitioner, as such trustee, is aggrieved by the order of the Honorable Bernard J. Abrott herein dated August 28, 1956, a copy of which order is annexed hereto, marked Exhibit "A" and made a part hereof.

II.

That said order holds that the unsecured claims of J. A. Fazio and L. C. Ambrose in the respective sums of \$34,147.55 and \$7,871.17 objected to herein by your petitioner, as such trustee of the above-named Bankrupt estate, be allowed in full as filed and permits said Claimants to participate on a pro-rata share basis in the assets of the estate of said Bankrupt with the allowed claims of all other general and wholly unsecured creditors; that it further orders that the objections heretofore interposed by your petitioner, as such trustee of said bankrupt estate, be overruled.

Petitioner contends that the claims of J. A. Fazio

and L. C. Ambrose, if allowed at all, should be subordinated to those of the other unsecured creditors upon the following grounds:

(a) The so-called "deep rock" doctrine established by the U. S. Supreme Court requires that the claims of controlling shareholders for purported loans to themselves will be subordinated to those of general creditors where the corporation has been inadequately capitalized; to do otherwise would be unfair and inequitable to those creditors.

(b) Admitted capital contributions cannot, as a matter of law, be later converted into debt obligations by the simple expedient of taking back promissory notes for such capital advances so that such contributors can participate with general unsecured creditors when the business later goes into bankruptcy.

(c) A conditional obligation to pay a debt out of an uncertain fund does not accrue until the condition is performed. Accordingly, when the testimony is undisputed that the claims of J. A. Fazio and L. C. Ambrose were to be "liquidated out of profits" and when such profits never arise, as was the case here, the claim is not provable in bankruptcy.

III.

That the Referee erred in said order in that the first finding of fact therein finds: "That at and before the filing of the petition for adjudication in bankruptcy herein, the above-named Bankrupt was and is justly and truly indebted to said Claimants in the respective sums of \$34,147.55 and \$7,871.17

for the considerations set forth, respectively, in said Proofs of "Claim."

Since the uncontradicted evidence conclusively shows that the claims of J. A. Fazio and L. C. Ambrose were to be "liquidated out of profits," and since such profits were never earned by the bankrupt corporation, the estate of said Bankrupt is not justly and truly indebted to said Claimants in the respective sums of \$34,147.55 and \$7,871.17.

IV.

The Referee erred in said order in that the fourth finding of fact therein holds as follows: "That the Promissory Notes upon which said Proofs of Claim are predicated were issued by said corporation in lieu of all of the capital investment of said Claimants in said partnership."

Since the consideration for said notes is capital investment, the case falls directly within the doctrines set forth in *Pepper v. Litton* and *Arnold v. Phillips* cited in trustee's opening and closing memorandums. As capital investment, such contributions cannot be turned into debts by afterward issuing notes so that the contributors can participate with general creditors. (See particularly the extract from *Arnold v. Phillips*) Shareholders cannot, by the very nature of this type of investment, share in their capital contribution with outside creditors.

The Referee further erred in the fourth finding which holds that: "* * * The net worth of the assets so transferred by said co-partners to said Bankrupt at the time of such transfer was no less than

the stated value, to-wit, \$6,000.00 of the shares of stock so issued as part of the consideration therefor."

By the opening balance sheet of Leonard Plumbing and Heating Supply, Inc., its current liabilities were shown to exceed current assets by the sum of \$1,370.35. Furthermore, the opinion of the trustee's expert witnesses support this contention.

V.

The Referee erred in said order in that the fifth finding of fact holds as follows: "That said bankrupt corporation was organized by said Claimants and by said B. T. Leonard and said transfer of the assets of said co-partnership to said bankrupt corporation was made in good faith and for a fair and valuable consideration, and that at the time of said transfer of the assets of said co-partnership, subject to its liabilities as aforesaid, neither said co-partnership nor said corporation were insolvent."

The uncontradicted evidence adduced at the hearing showed conclusively that the sole purpose of the co-partnership in setting up the corporation to take over the assets and liabilities of the co-partnership was to provide a means by which the Claimants J. A. Fazio and L. C. Ambrose were to share pro-rata in the assets of the corporation in the event of liquidation or bankruptcy.

VI.

The Referee erred in said order in that the sixth finding of fact therein holds: "That the paid-in stated capital of said bankrupt corporation was at

the time of its acquisition of the assets of said partnership, subject to its liabilities as aforesaid, adequate, under all of the facts and circumstances attending same for the continued operation of the plumbing supply business theretofore operated by said co-partnership and thereafter operated by said bankrupt corporation."

The uncontradicted evidence adduced at the hearing showed conclusively that paid-in stated capital of the bankrupt corporation was at all times inadequate.

VII.

The Referee erred in said order in that the seventh finding of fact therein holds: "That although Claimants by virtue of their ownership of the said aggregate of $66\frac{2}{3}\%$ of the issued and outstanding capital stock of the bankrupt corporation and their appointment and activities as constituting a majority of the Board of Directors of said bankrupt corporation controlled and dominated the said corporation and its affairs, they did not mismanage the said business or any part thereof, nor did said Claimants, or either of them, by any of their acts, separately or jointly, practice upon said bankrupt corporation, its other stockholder and/or any of its creditors any fraud or deception whatever, nor did they act in connection with said corporation or the issuance to them of the Promissory Notes upon which their said Proofs of Claim on file herein are predicated to the detriment of said bankrupt corporation, its other stockholder or any of

its creditors for their own personal or private benefit, or otherwise, or at all."

The uncontradicted evidence adduced at the hearing conclusively shows that at the time said Bankrupt was incorporated all capital investment, including that of Claimants J. A. Fazio and L. C. Ambrose, were converted from the partnership account to an account entitled "Loans from Co-Partnership" and this action was a scheme and device to place said co-partners in the same class as unsecured creditors of said co-partnership and the bankrupt corporation thereafter organized to take over the assets and liabilities of said co-partnership; that said Claimants so dominated and controlled said corporation and its affairs to permit said scheme and plan to be carried out.

VIII.

That the Referee erred in said order in that the eighth finding of fact therein holds: "That it is not true, as alleged in said Trustee's Objections, that the incorporation of the bankrupt and the issuance to Claimants of the Promissory Notes in question, or either of them, was a part of any scheme or plan to place Claimants, as such co-partners, in the same class as the "unsecured creditors of said partnership."

The uncontradicted evidence adduced at the hearing shows conclusively that the incorporation of the Bankrupt and the issuance to Claimants of the promissory notes in question was a part of the scheme and plan to place Claimants in the same

class as the unsecured creditors of the co-partnership.

IX.

The Referee erred in said order in that the ninth finding of fact therein holds: "That the sum of \$1,250.00 was and is a reasonable sum to be allowed to the attorneys for Claimant, J. A. Fazio, in connection with the Alameda County Superior Court action No. 258062."

The record is absolutely barren of any evidence to support this finding that the sum of \$1,250.00 was and is a reasonable sum to be allowed to the attorneys for Claimants J. A. Fazio and L. C. Ambrose in connection with Alameda County Superior Court action No. 258062, or to show that this estate in bankruptcy is in any way or at all obligated to pay attorneys' fees in said action.

X.

The Referee erred in said order in that the eleventh finding of fact therein holds: "That the Promissory Notes upon which the said Proofs of Claim herein filed by Claimants are predicated were not, nor were any of them, intended to be by the parties thereto, nor were they, promises to pay the respective amounts thereof from any specific or any uncertain fund."

The uncontradicted testimony of the Certified Public Accountant who was called as a witness on behalf of the Claimants shows conclusively that the claims of J. A. Fazio and L. C. Ambrose were to be "liquidated out of the profits." Since such profits

never did arise, the claims could not be approved, allowed and ordered paid by the Referee.

XI.

The Referee erred in the conclusion of law which holds as follows: "That in the procurement of the Promissory Notes upon which the Proofs of Claim herein filed by Claimants are predicated, said Claimants acted in all respects in good faith and took no unfair advantage of either the bankrupt corporation, its other stockholder, or any of its then existing or subsequent creditors, and that said Claimants and each of them are therefore entitled to participation on a pro-rata basis in the assets of the estate of the above-named Bankrupt with all other general and wholly unsecured creditors on file, approved and allowed herein, and good cause appearing therefor."

XII.

The Referee erred in making the following order: "It Is Hereby Ordered that the said Objections heretofore interposed herein by said John Costello, as Trustee of the estate of the above-named Bankrupt, to the said Proofs of Claim heretofore filed herein by said J. A. Fazio and L. C. Ambrose in the respective sums of \$34,147.55 and \$7,871.17 be and the same are hereby overruled and that said claims, and each of them, be and they are hereby allowed, as filed, as general and wholly unsecured claims against said estate, for pro-rata participation as such in the assets of said estate."

Wherefore, your petitioner prays that said order

be reviewed by the Judge of the U. S. District Court having jurisdiction in the above-entitled bankruptcy proceedings in accordance with the provisions of the Bankruptcy Act; that said order be reversed; that the trustee's objections to the claim of J. A. Fazio in the sum of \$34,147.55 and the claim of L. C. Ambrose in the sum of \$7,871.17 be sustained and that said claims of J. A. Fazio and L. C. Ambrose be decreed to be inferior in right to the interests of the general unsecured creditors of Leonard Plumbing and Heating Supply, Inc., in any distribution of the assets of said Bankrupt in said proceedings.

/s/ JOHN COSTELLO,

Petitioner.

FRANCIS P. WALSH,

HENRY GROSS,

JAMES M. CONNERS and

STUART R. DOLE,

/s/ By FRANCIS P. WALSH,

Attorneys for Petitioner.

[Note: Exhibit "A"—Order Overruling Trustee's Objections to Proofs of Claim of J. A. Fazio and L. C. Ambrose is set out at pages 24-30 of this printed record.]

Duly Verified.

Certificate of Service by Mail Attached.

[Endorsed]: Filed Sept. 25, 1956.

In The United States District Court, Northern
District of California, Southern Division

No. 43763—In Bankruptcy

In the Matter of

LEONARD PLUMBING & HEATING SUPPLY,
INC., a California corporation, Bankrupt.

ORDER AFFIRMING REFEREE'S ORDER

There is substantial evidence in the record to sustain the findings of the Referee. His order overruling the Trustee's objections to the proofs of the claims of J. A. Fazio and L. C. Ambrose is therefore affirmed.

Dated: April 11, 1957.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed April 12, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John Costello, the duly qualified and acting trustee of the estate of Leonard Plumbing & Heating Supply, Inc., a California corporation, the above named bankrupt, hereby appeals to the United States District Court of Appeals for the Ninth Circuit from the final

order of the Hon. Louis E. Goodman, United States District Judge of the above entitled Court signed on April 11, 1957, and filed on April 12, 1957, affirming the order of the Hon. Bernard J. Abrott, Referee in Bankruptcy, signed and filed on the 28th day of August, 1956, wherein said Referee overruled the trustee's objections to the proofs of claim filed herein by J. A. Fazio and L. C. Ambrose.

Dated at San Francisco this 30th day of April, 1957.

FRANCIS P. WALSH &
HENRY GROSS,

/s/ By FRANCIS P. WALSH,

/s/ JAMES M. CONNERS,

/s/ STUART R. DOLE,

Attorneys for John Costello, Trustee of Leonard
Plumbing & Heating Supply, Inc., Bankrupt.

[Endorsed]: Filed May 7, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal as designated by the attorneys for the Trustee:

Referee's Certificate on Review of Order overruling.

Proof of Claim of J. A. Fazio.

Proof of Claim of Lawrence Ambrose.

Trustee's Objection of Proof of Claim of J. A. Fazio.

Trustee's Objection of Proof of Claim of L. C. Ambrose.

Opening Memorandum of Points & Authorities—Trustee's.

Claimant's Reply Memorandum of Points & Authorities.

Trustee's Closing Memorandum of Points & Authorities.

Letter of June 13, 1956 to Referee in Bankruptcy.

Order Overruling Trustee's Objections to Proof of Claim of Fazio and Ambrose.

Order Extending Time to File Petition for Review.

Petition for Review.

Transcript of Hearing on Trustee's Objection to Claim of Fazio and Ambrose.

Claimant's Exhibits 1 to 5.

Trustee's Exhibits 1 to 5.

Order Affirming Referee's Order.

Notice of Appeal.

Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of June, 1957.

[Seal] C. W. CALBREATH,

Clerk.

/s/ WM. J. FLINN,

Deputy Clerk.

In The Southern Division of the United States
District Court, Northern District of California

No. 43763

In The Matter of

LEONARD PLUMBING & HEATING SUPPLY,
INC., a California corporation, Bankrupt.

TRANSCRIPT OF HEARING ON TRUSTEE'S
OBJECTION TO THE CLAIM OF J. A.
FAZIO AND LAURENCE C. AMBROSE

Oakland, California

January 17, 1956, et seq.

Before Honorable Bernard J. Abrott, Referee in
Bankruptcy.

Appearances: Francis P. Walsh, Esq., Stuart
R. Dole, Esq., Attorneys for Objecting Trustee.
Shapro & Rothschild, by Arthur P. Shapro, Esq.,
Attorney for Claimant J. A. Fazio. Frank M.
Crews, Esq., Hon Chew, Esq., Attorneys for Claim-
ant Laurence C. Ambrose.

January 17, 1956—10:00 a.m.

The Referee: Trustee's objection to the claim
of J. A. Fazio.

Mr. Walsh: That's ready, your Honor.

Mr. Dole: That's ready, your Honor.

The Referee: Mr. Walsh and Mr. Dole appear
as attorneys for the objecting trustee; Mr. Shapro
appears for the claimant.

Mr. Shapro: Yes, your Honor. In view of the

contents of the objections as to the proof on the part of the claimant and assuming only the burden of going forward at this time, the creditor will call Mr. Fazio.

Mr. Walsh: Your Honor please, I think that under the law this claim is based upon a balance due on a promissory note. That being the case, I think the burden is on the objecting trustee.

Mr. Shapro: Well, your Honor, I'm only quoting from the objections themselves.

Mr. Walsh: I understand that.

Mr. Shapro: And if counsel for the trustee wants to assume the burden, I have no objection.

The Referee: Very well.

Mr. Dole: Your Honor, there should be a distinction drawn between the claim of J. A. Fazio and the claim of Laurence Ambrose. [1]*

The Referee: We're not proceeding on the claim of Ambrose at the present time.

Mr. Dole: Fine. I suggest, however, and move at this time that so far as the testimony of one or the other applies to the organization as a group that they be combined for that purpose in order to eliminate duplication.

Mr. Shapro: Now, your Honor, I don't quite understand counsel's point. Before I agree to it, I would like to be sure I understand it. If it is the desire of counsel for the trustee to have testimony of any witness other than the witnesses called by either party on behalf of another or in connection

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

with the objection to the claim of Mr. Ambrose, that's something else again but if his request is confined to testimony adduced in connection with the claim or the objection of the claim of Mr. Fazio, of course, I have no objection. In other words, I don't want to have Mr. Fazio bound, your Honor, by any testimony taken in connection with the claim of Mr. Ambrose unless the witnesses are first called by the respective parties in connection with the hearing of the objection to the claim of Mr. Fazio and I understood your Honor to direct that the hearing proceed on the trustee's objection on the claim of Mr. Fazio alone.

The Referee: Correct.

Mr. Dole: Your Honor, what I am suggesting is that [2] actually, the two proceedings be combined for hearing.

The Referee: As long as Mr. Dole has made that suggestion, let the record show that Mr. Crews and Mr. Chew are present in court as counsel for the claimant Ambrose. Mr. Crews and Mr. Chew, Mr. Dole on behalf of the objector has suggested that with reference to the corporation and so forth that rather than to go through the proceedings twice, he would prefer that the examination in the matter of Fazio be considered a part of the matter of Ambrose. You gentlemen have no objection.

Mr. Crews: I have no objection, your Honor, as long as the testimony that's offered will apply where pertinent to the claims of each person involved. It may be combined for the purpose of a hearing.

The Referee: I understand that your statement

was merely to facilitate the hearing rather than to try the matter from the start.

Mr. Dole: Exactly, your Honor.

The Referee: On the same ground.

Mr. Dole: That's right.

The Referee: And that you are primarily concerned with certain questions and answers relative to the partnership and the change into the corporation and so forth, is that right?

Mr. Dole: I am, your Honor.

Mr. Walsh: Your Honor, may I have again the names of [3] the attorneys for Mr. Ambrose?

The Referee: Yes, Mr. Crews of Purchio & Crews.

Mr. Dole: How do you spell that?

Mr. Crews: C-r-e-w-s—Frank M. Crews.

Mr. Dole: And——

The Referee: Mr. Chew, C-h-e-w.

Mr. Chew: C-h-e-w—Hon Chew.

The Referee: And he is of the firm of Purchio & Crews.

Mr. Crews: No, your Honor. He is only associated with our law firm in this particular matter.

The Referee: Based on Mr. Crews' statement, you gentlemen would have no objection.

Mr. Crews: No, your Honor.

The Referee: And Mr. Dole and Mr. Walsh, you may proceed with the objection in the matter of Fazio.

Mr. Dole: I will call Mr. Fazio.

The Referee: Mr. Fazio?

J. A. FAZIO

called as a witness on behalf of the objecting trustee, being first duly sworn by the Referee, testified as follows:

Mr. Dole: Your Honor, for the record, this examination is under the provisions of Section 21(j) of the Bankruptcy Act. [4]

The Referee: Very well. Your name is Mr. J. A. Fazio?

The Witness: J. A. Fazio.

The Referee: And you are the claimant; you are a creditor-claimant in these proceedings.

The Witness: Yes, sir.

Direct Examination

Q. (By Mr. Dole): Mr. Fazio, you are the president of Leonard Plumbing & Heating Supply Company, is that correct? A. Yes, sir.

Q. And you have presented to this court a claim in the amount of \$34,147.55 based upon a promissory note which is attached to the claim in the amount of \$41,169.61, is that correct?

A. Yes, sir.

Q. And what does the difference between those two figures represent, Mr. Fazio?

A. Why, from my stock in the company I donated to Mr. Ambrose.

Q. How much, sir? A. Around \$4,000.00.

Q. You donated your stock, you say?

A. Yes, gave it to Mr. Ambrose as a bonus.

Q. And when you say you donated stock, are you

(Testimony of J. A. Fazio.)

referring to the certificates of stock in the corporation?

A. The amount that I had invested in the Leonard Plumbing Supply.

Q. And did you transfer shares of stock to Mr. Ambrose? A. Mr. Laborde has got that.

The Referee: Wait a minute, I don't want to hear any [5] of this Mr. Laborde. In all probability, Mr. Shapro has Mr. Laborde here for a particular purpose and he may or may not call him. Now, you either answer questions if you can or if you know. You don't have to make any suggestions as to who can answer it. Now, did you give any shares of stock or any stock to Mr. Ambrose?

A. Well, yes, I call it stock.

Q. I see. And how many shares did you transfer to Mr. Ambrose? A. Four Thousand Dollars.

Q. Do you know what the original issue value of the shares was—the value of the shares given on original issue? A. No, I don't remember.

Q. You don't remember. So you don't know how many shares you transferred to him.

A. That's right.

Q. Do you recall the date the transfer was made, sir? A. I don't remember that either.

Q. Now, referring to this note as a whole—Withdraw that, please, Miss Reporter. Does that explain the entire difference between the \$41,169.61, the value of the note and the \$34,147.55 the value of your claim? Does that explain the entire difference between those two figures?

(Testimony of J. A. Fazio.)

Mr. Shapro: I object to the question on the ground it calls for the opinion and conclusion of the witness, your Honor.

The Referee: Do you know whether or not it explains it? [6]

The Witness: The Four Thousand Dollars——

The Referee: Do you know? Just answer the question.

The Witness: Yes, sir.

The Referee: Do you know the reason for the difference in the two amounts?

The Witness: Well, just the amount that I gave to Mr. Ambrose for a bonus.

The Referee: Overruled.

Q. There's no other consideration explaining the difference between these two figures then, is there?

A. No.

Q. Now, referring to the original note, Mr. Fazio, could you tell me the consideration that was given for that note? A. The consideration?

Q. What did you give to the corporation and—yes, to the corporation, in return for the note?

A. Why, material was my stock.

Q. A little while ago on your previous examination, Mr. Walsh asked you what you gave—what consideration you gave for the stock that you received in Leonard Plumbing & Heating Supply Company and you replied that it was the material that you gave to the corporation, is that correct?

A. That's right.

Q. Is that the same material?

(Testimony of J. A. Fazio.)

A. Same material.

Q. It's the same material represented by the stock.

A. Yes, sir.

Q. What did that material consist of that you transferred to the corporation, sir? [7]

A. Fittings of different kinds—plumbing material.

Q. When was that transfer made?

A. When the Leonard Plumbing Supply was started.

Q. Are you referring now to the corporation or the partnership?

A. The partnership.

Q. Do you remember the approximate date? Wasn't that sometime in 1949?

A. I don't remember the exact date.

Q. Do you remember whether it was 1949?

A. The date I can't tell you.

Q. Nineteen forty-nine was the year the partnership was organized.

A. It must have been '49 then.

Q. When you transferred that material, did you have an appraisal made of the material by an independent appraiser?

A. No. Mr. Leonard himself priced it.

Q. Mr. Leonard himself priced it?

A. Yes, sir.

Q. Now, that contribution that you speak of as having been made in 1949 was the entire contribution of the partnership, wasn't it?

A. Yes.

Q. And that's the same thing that you are referring to when you refer to the contribution made to

(Testimony of J. A. Fazio.)

the corporation, isn't it? A. That's right.

Mr. Dole: I have no further questions.

The Referee: Mr. Shapro, do you desire to ask any questions at this time?

Mr. Shapro: Not at this time, your Honor.

The Referee: Thank you, Mr. Fazio. You are temporarily [8] excused. Mr. Dole or Mr. Walsh.

Mr. Dole: I would like to call Mr. Laurence C. Ambrose, please.

The Referee: Mr. Ambrose.

LAURENCE C. AMBROSE

called as a witness by the objecting trustee, being first duly sworn by the Referee, testified as follows:

The Referee: Your name is Laurence C. Ambrose?

The Witness: Laurence C. Ambrose.

The Referee: And where do you reside, Mr. Ambrose?

The Witness: No. 28 El Galbin, G-a-l-b-i-n.

Mr. Dole: Again, your Honor, I would like the record to show that Mr. Ambrose is being called under the provisions of Section 21(j) of the Bankruptcy Act.

The Referee: So ordered.

Direct Examination

Q. (By Mr. Dole): Mr. Ambrose, are you associated with Leonard Plumbing & Heating Supply Company, Inc. in any way?

A. Secretary-treasurer.

(Testimony of Laurence C. Ambrose.)

Q. You are secretary-treasurer. How long have you occupied that position?

A. Until it closed.

Q. From the inception of the corporation until it closed? A. That's right.

Q. Prior to that, were you associated with the partnership known as Leonard Plumbing & Heating Supply Company? [9] A. That's right.

Q. And in what capacity were you associated?

A. Just a partner.

Q. You say—— A. Just equal partners.

Q. Equal partner. You have submitted a claim in this matter in the sum of \$7,871.17, is that correct?

A. That's right.

Q. What does that sum represent, sir, and what is the consideration?

A. Money loaned to the company or the corporation.

Q. Do you have notes evidencing that money?

A. What?

Q. Do you have notes evidencing that money that was loaned to the corporation?

A. Yes, certainly. Here is one of the checks for \$2,000.00, there's one for \$1,200.00—I couldn't recall the next, but here is what the original note when it was—and this one went back in the corporation, plus \$4,000.00 that was transferred from Fazio to me.

Q. I see. The two checks which you have presented here—— A. As cash.

Q. Check No. 73 and check No. 75——

(Testimony of Laurence C. Ambrose.)

Mr. Dole: Let the record show at this time that Mr. Ambrose has handed me two checks—one dated November 26, 1948, No. 73, drawn on the West Berkeley office of the American Trust Company, Federal Reserve No. 90-1282 over 1211, the check being in the amount of \$1,200.00 payable [10] able to the order of Leonard Plumbing & Heating Supply Company. The check is signed by L. C. Ambrose. The second check is numbered 75, dated December 13, 1948, payable to West Berkeley office of the American Trust Company, with the same federal reserve number. This check is made out to the order of Leonard Plumbing Company. It's in the amount of \$2,000.00, bears the endorsement of L. C. Ambrose.

Mr. Shapro: You said endorsement; you meant signature.

Mr. Dole: Signature. Thank you, Mr. Shapro. Mr. Ambrose has handed me two notes, the first dated September 15, 1952, the note being in the amount of \$4,451.17 to the order of L. C. Ambrose and the note is signed by Leonard Plumbing & Heating Supply Company; it bears the endorsement of J. A. Fazio, B. T. Leonard, Laurence C. Ambrose.

Mr. Shapro: You mean signatures.

Mr. Dole: Signatures. And on the face of the note are the words "replaced by Leonard Plumbing & Heating Supply, Inc. notes." The second note is dated October 1, 1952 in the amount of \$4,051.17, made payable to the order of L. C. Ambrose and the

(Testimony of Laurence C. Ambrose.)

note bears the signature of Leonard Plumbing & Heating Supply, Inc., J. A. Fazio, B. T. Leonard and Laurence C. Ambrose.

Q. Now, Mr. Ambrose, these two checks were not given to the [11] corporation, were they—the sums represented by these two checks?

A. What's that, again?

Q. The sums represented by these two checks were not given to the corporation, were they?

A. No, no, it was given to the business when they first started and it never was taken out of the business—as a loan.

Q. It was given to the partnership at the time of its inception. A. That's right.

Q. November 26, 1948 and December 13, 1948.

A. Yes, transferred over to the corporation.

Q. I see. And so it wasn't until September 15, 1952 that you took a note for \$4,451.00 from the partnership, is that correct? A. Yes.

Q. And what does that note represent—the sum of that note?

A. The money that I loaned the corporation.

Q. Did you loan them more money than is represented by these two checks?

A. No, just what's there plus the Four Thousand that Mr. Fazio gave me which was not in that note, naturally.

Q. You have the sum total of two checks you have here is in the amount of \$3,200.00.

A. Because I can't recall what the other check

(Testimony of Laurence C. Ambrose.)

was but you will find it in the big books. I just found those.

Q. Is this the only contribution you made to the partnership? A. That's right.

Q. So you wrote yourself a check or the partnership gave [12] you a note for the entire amount of your contribution, is that correct?

A. When the thing was turned over to the corporation, this plus some other check I can't find, amounted to that.

Q. I see.

A. And that's why they give back a note when it formed the corporation.

Q. I see. You took this note just before the corporation was formed.

A. No, no, after the corporation was formed.

Q. But this note is dated September 15, 1952. When was the corporation formed?

A. Well, here, it's got the seal on it. They might have dated them the same way as the note but there's the seal.

Q. Well, the note shows the seal of the corporation to say September 22, 1952.

A. Well, I don't know about that.

Q. Is that the date of the incorporation?

A. Probably so as far as I can remember.

Q. What was your job in the corporation?

A. Secretary-treasurer.

Q. You don't know when it was incorporated?

A. I can't recall it, no.

(Testimony of Laurence C. Ambrose.)

Q. So far as you know, this is correct—the figure on this seal? A. That's right.

Q. Now, why were you given this note, Mr. Ambrose?

The Referee: When you say "this note"— [13]

Mr. Dole: I am referring to the note of September 15, 1952.

A. Well, this is the amount they owed me at that time. As I said, I can't recall the rest of the checks; I can't find them. But if you get the books, you will see it in the books.

The Referee: No, Mr. Ambrose, the Court is bearing in mind that there were more than the two checks.

The Witness: There were more than the two.

The Referee: That were presented to the Court to make up this amount.

The Witness: There were but I just can't—

The Referee: Let's assume that all of the checks were here making up that amount. Mr. Dole wants to know why you were given that note.

The Witness: Because the money that I put in the business.

The Referee: Represented by those checks.

The Witness: Represented by those checks.

The Referee: And this note.

The Witness: Cash.

Q. And what was the reason for cancelling this note? A. I didn't cash that note.

Q. Cancelling it.

A. Cancel it, because at that time during the

(Testimony of Laurence C. Ambrose.)

partnership it wasn't a corporation. Then we turned over to a corporation, I had to get up a note back for the money I put in the business [14] in the beginning which that offsets that. That's the transferred note.

Q. This was a partnership note, was it not?

A. That's right.

Q. This is the one of September 15.

A. Yes, that's right, the beginning of the business.

Q. Then when the corporation was formed, you cancelled that note.

A. They cancelled that note and give me a new one.

Q. I know the figure of the new one is \$400.00 less than the figure of the old note.

A. The \$400.00 less was during the time of the business before it closed, I took one of the cars over—an old car, and I cut down my obligation \$400.00.

Q. What kind of—you say you took over a new car?

A. No, an old car we had there.

Q. An old car. A. Yes.

Q. What kind of a car was it?

A. It was a Chevrolet, I think.

Q. Do you remember the year and model?

A. I couldn't tell you that.

Q. You don't remember the year.

A. No, but it's on the books.

Q. Do you still have the car? A. No.

Q. You sold it?

A. I gave the car to my daughter. [15]

(Testimony of Laurence C. Ambrose.)

Q. Does your daughter still have the car?

A. Yes.

Q. Do you remember the year and model of the car?
A. I don't remember it.

Q. Your daughter owns the car that you gave her and you don't know the year and model?

A. I didn't take it in my mind to remember it; I just took the car over the first time I bought the business. I suggest the books you can see it.

Q. I notice this note is just dated fourteen days after the former note.

A. No, sir, on the books I owed the \$400.00; it had been on the books for a long time so when we made up the books, then I had to take that note and cut it down \$400.00. No use me raising the note \$400.00 when I owe the company Four Hundred bucks.

Q. Mr. Ambrose, as secretary it was your duty to record the minutes, all of the minutes of——

A. Yes, you will find it in the minutes.

Q. When did you have the first meeting of the organizers of the corporation?

A. I couldn't remember that.

Q. Do you recall whether or not you recorded the minutes of that meeting?
A. No, I can't.

(Discussion off the record.)

Q. Mr. Ambrose, I'm going to show you this book and ask you what it is.

Mr. Shapro: May I see it first, please? [16]

(Mr. Dole handed the book to Mr. Shapro.)

Q. Now, Mr. Ambrose, I'm showing you this

(Testimony of Laurence C. Ambrose.)

book and asking you what that is. I'm referring now to the whole book, Mr. Ambrose.

A. Just this one page?

Q. No, the whole book as a book, asking you what that book is.

A. Well, referring to the book, it's a minute book.

Q. And was that book kept by you?

A. Well, it was kept in the office and I——

Q. And you were secretary of the corporation, were you not? A. Yes.

Q. Were you in charge of that book?

A. No, we left it in the safe. I didn't take that book home. I just left it at the business.

Q. I know that but didn't you prepare the minutes of the meeting of the board of directors?

A. Yes; after we had the meeting, yes.

Q. And you signed all the minutes.

A. I signed them all after we get through, yes.

Q. And those minutes were kept in accordance with the customary business practice in Leonard Plumbing & Heating Supply Company, Inc.?

A. That's right.

Q. And in the reasonable course of business.

A. That's right.

Q. And they reflect accurately and truly what went on in the meetings—the various meetings of the board of directors. [17] A. That's right.

Mr. Shapro: I object to the question as calling for the opinion and conclusion of the witness what they actually and truly represent.

(Testimony of Laurence C. Ambrose.)

Mr. Dole: He prepared them as the secretary. I think he can answer that question.

The Referee: He may answer. Overruled.

A. I signed them.

Q. What's that?

A. I signed them after the meeting was over.

Q. Do they reflect the business that was conducted at the various meetings of the board of directors, truly and accurately? A. Yes.

The Referee: Mr. Dole, then you had better mark that. Trustee's 1 for identification—the minute book.

(The book referred to was received for identification by the Referee and marked "Trustee's Exhibit No. 1 for Identification.")

Q. Now, Mr. Ambrose, do the minutes which are contained in this minute book truly reflect all of the transactions which took place both at the meeting—meetings of the boards of directors, the meetings of the shareholders and all transactions which the minute book purports to cover between shareholders and directors? A. Supposed to be, yes.

Q. Now, I'm referring to—at this time, to the minutes dated 29th day of September, 1952. Do you recall having a meeting [18] of the organizers of Leonard Plumbing & Heating Supply Company, Inc. on that day? A. I can, yes.

Q. And is this set of minutes consisting of one, two, three, four, five, six pages the set of minutes for that meeting? A. That's right.

(Testimony of Laurence C. Ambrose.)

Q. And was that the organization meeting of the corporation? A. As far as I know, yes.

Q. I'm going to read one of those sets of minutes to you and ask you if that is true and proper.

The Referee: Mr. Doyle, before you do, let the claimants take a look at—point out to them the part you are going to read and let counsel for the claimants take a look at what you have in mind.

Mr. Dole: On page 3 at the place marked to the place marked on page 4. In other words, omitting the first paragraph on page 3, taking the second paragraph clear to the bottom of the page and the first two paragraphs on page 4.

Mr. Shapro: I suggest, instead of reading it—it's rather long—that he let the witness read it.

Mr. Dole: Somebody should read it—I want it read into the record. I don't care who reads it.

Mr. Shapro: I withdraw the suggestion.

Q. Now, Mr. Ambrose, I'm reading from these minutes at the place I have indicated before:

(Reading): "The chairman then answered that the corporation [19] had been formed for the purpose of taking over the existing business of Leonard Plumbing & Heating Supply, a partnership. I stated that the partners in that company had agreed to convey to the corporation all their right, title and interest in and to the assets and goodwill of said partnership in consideration of the corporation assuming all of the outstanding liabilities of the said partnership as at the time of such transfer

(Testimony of Laurence C. Ambrose.)

and agreeing to issue to each of said partners no par value common stock of the corporation as soon as the necessary permit can be secured for the issuance of said stock from the California Corporation Commissioner. The amount of the stock issued would be based upon the actual book value of each of such partner's interest in and to the assets of the partnership. One share of no par value common stock to be issued for each \$10.00 of such value.

On motion duly made, seconded and unanimously carried, the following resolution was adopted:

Resolved, That the office of the partners of Leonard Plumbing & Heating Supply, such partners being Joseph A. Fazio, Bertrand T. Leonard and Laurence C. Ambrose to turn over the assets and goodwill of said partnership to the corporation, be and the same is hereby accepted; and

Be it further resolved, that this corporation take over the said business of Leonard Plumbing & Heating Supply as of the opening of business on the 1st day of October, 1952 and to assume the liabilities of said business as at that time; and

Resolved further that the secretary of this corporation be and he is directed to deliver to the said Joseph A. Fazio, Bertrand T. Leonard and Laurence C. Ambrose one share of the no par value common stock of the corporation for each \$10.00 of book value of their respective interests in and to the assets of the said partnership as soon as a permit for the issuance of said stock is secured from the California Corporation Commissioner and said part-

(Testimony of Laurence C. Ambrose.)

ners to deliver to the corporation a satisfactory conveyance of the property transferred.

The necessity of securing a permit to issue the stock was discussed and on motion made and seconded the following resolutions were unanimously adopted." [20]

I shan't read any further than that. Now, Mr. Ambrose, do those paragraphs which I have just read from your minutes directly reflect——

A. They're true.

Q. (Continuing): ——the business which was conducted at the meeting of that particular——

A. That's right, yes.

Q. Of the organizers at that time, Leonard Plumbing & Heating Supply Company, Inc.

A. That's right.

Q. Was there anyone present other than yourself and Mr. Fazio and Mr. Leonard at that meeting?

A. I can't recall it.

Q. Just the three of you were present?

A. Yes, sir.

Q. As far as you know, at any rate. At that meeting, did you consider the financial difficulties of the partnership?

A. What's that?

Q. I say at that meeting did you consider the fact that the partnership had been having financial difficulty?

A. I don't know.

Mr. Crews: I object to that, your Honor, on the ground he is assuming something not in evidence.

The Referee: Sustained.

Q. Mr. Ambrose, I show you now a document——

(Testimony of Laurence C. Ambrose.)

Mr. Ambrose, do you know whether or not the partnership had lost money in the year October 1, 1951 to September 30, 1952?

A. I don't think we lost any money.

Q. You don't think you did.

A. We might have lost some but I think in the business when [21] we were straight partners we didn't lose no money. It wasn't a question of changing the business into a corporation because by losing money; we wasn't losing money. We thought we would turn the thing over to a corporation because we were never there half the time.

Mr. Dole: Your Honor, I request that the answer be stricken as not responsive to the question.

The Referee: Well, the part with reference to during the partnership we didn't lose any money can stay in; the rest of it can go out.

Q. Isn't it a fact that you lost Twenty-two Thousand Five Hundred Twenty-one Dollars and Thirty-four Cents in the period that I have just mentioned?

A. In the corporation or in the other business?

Q. In the partnership—the last year of the partnership.

A. Well, I can't recall those figures. If we did, I can't recall them.

Q. Did you ever discuss the fact of the loss with the other partners at any time?

A. I don't recall it.

Q. You can't recall it is your answer.

A. No.

(Testimony of Laurence C. Ambrose.)

Q. Do you wish to reconsider your testimony that the partnership had never lost any money?

A. We lost money and we made money. There are records there to prove it if you look at your statement. We might have lost money some years; some years we might have made money.

Q. But you don't recall what happened in the years immediately [22] preceding the incorporation?

A. No, I don't. In fact, your Honor, isn't it my question mostly concerning my notes without bringing all that stuff in?

The Referee: Mr. Ambrose, you are represented by your attorneys.

Mr. Crews: We will object, Mr. Ambrose, if we feel it's immaterial.

Q. Mr. Ambrose, the claim against the company or against the corporation here was in the amount of \$7,871.75. You presented a note here in the amount of——

Mr. Walsh: \$7,871.17.

Q. (Continuing): ——\$7,871.17 and a note in the amount of \$4,051.17 and you are certain that represents your investment in the partnership that you made in 1948.

A. Yes, but not during that time——

Q. I haven't asked the question. That's correct, as far as we have gone now.

A. That's right.

Q. What does the difference represent between

(Testimony of Laurence C. Ambrose.)

the amount of this note and the amount of your claim?

A. On that and—on the Four Thousand.

Q. The amount of your claim is \$7,871.17.

A. It is, plus the Four Thousand Dollars bonus that was transferred from Fazio to my account. Now, that was transferred to my account. That's why the difference there. You see it in the books.

Q. I beg your pardon, sir, I just don't understand your [23] answer. Would you read it back, please?

The Referee: Is this your answer, Mr. Ambrose? That the total amount in your claim is the amount of one of those notes.

The Witness: That's right.

The Referee: Plus this \$4,000.00 that Mr. Fazio had given you.

The Witness: That's right.

Q. Mr. Fazio had given you \$4,000.00?

A. That's right.

Q. How did he give you the \$4,000.00?

A. Transferred from his account to mine in the business which was cashed and you can see those transfers made way before this place ever closed up.

Q. Was that transfer a part of the capital contribution of Mr. Fazio and the partnership?

Mr. Shapro: I am going to object to the question as calling for the opinion and conclusion of the witness. Capital contribution, that's one of the things your Honor is going to have to pass on.

The Referee: Sustained.

(Testimony of Laurence C. Ambrose.)

Q. He never gave you an assignment of accounts receivable. A. No.

Q. Prior to incorporation or at the time of the incorporation, did you and the other partners have discussions concerning the financial difficulties of the partnership? [24]

Mr. Shapro: I object to the question on the ground it assumes a fact not in evidence. There is no evidence yet that there was any financial difficulties in the partnership.

Mr. Walsh: I think that's a proper question.

The Referee: Did you hear the question?

The Witness: No.

Mr. Dole: You didn't.

The Witness: No.

The Referee: Overruled. Change that question to finances. Financial situation of the corporation instead of financial difficulties.

Mr. Shapro: If amended, I withdraw the objection, your Honor.

Q. Prior to the formation of the corporation, did you and the other partners ever discuss the finances of the partnership? A. No.

Q. You did not. A. No.

Mr. Dole: I have no further questions, Mr. Ambrose.

Mr. Shapro: Just a minute, Mr. Ambrose.

Examination

Q. (By Mr. Shapro): Do you understand what

(Testimony of Laurence C. Ambrose.)

Mr. Dole means by discussion of finances of the partnership? A. Yes.

Q. Tell me what you think it means, please, sir.

A. It means that the business can't carry on its business, that they're short of money. Is that your question? [25]

The Referee: Don't ask Mr. Dole. Just answer Mr. Shapro.

Q. Now, Mr. Ambrose, isn't it a fact that from time to time you and Mr. Leonard and Mr. Fazio discussed how much money was being made or lost or how much money—how much business was being done by the partnership? A. That's right.

Q. To your knowledge, was the fact that the—if it was a fact—that the partnership lost money in 1952 ever discussed between you, Fazio and Leonard or with you or by you with either of the other two gentlemen? A. Yes, we lost money.

Q. And——

Mr. Walsh: Just a minute now, I ask that that answer go out as not responsive.

The Referee: It's not responsive. So ordered. Now, Mr. Ambrose, you listen to Mr. Shapro's question.

Mr. Shapro: Will you read it please?

(The last question was read by the Reporter.)

A. I can't recall it, Shapro.

Q. You can't recall it. When in response to one of Mr. Dole's questions you referred to an assignment or transfer of an account by Mr. Fazio to you

(Testimony of Laurence C. Ambrose.)

in the sum of \$4,000.00 isn't it a fact that you were referring to part of his note for \$4,000.00?

Mr. Dole: Just a minute, if your Honor please. He answered no. His answer was he received no assignment and I object to Mr. Shapro's question, your Honor. [26]

Mr. Shapro: Your Honor please, if we want to have the question read to which the answer was given no, you will find Mr. Dole used the words "accounts receivable."

The Referee: As far as the Court is concerned, I am only interested in the facts. You can answer the question even technically the objection may be good.

A. You mean the total——

Mr. Dole: Just a minute, Mr. Ambrose. I suggest you not make any voluntary statements but answer the questions propounded to you by counsel.

Mr. Shapro: Will you read it please?

(The last question was read by the Reporter as follows: "Question: You can't recall it. When in response to one of Mr. Dole's questions you referred to an assignment or transfer of an account by Mr. Fazio to you in the sum of \$4,000.00, isn't it a fact that you were referring to part of his note for \$4,000.00?")

A. Yes.

Mr. Shapro: No further questions.

Mr. Dole: Your Honor please, so we will have the record clear, is Mr. Shapro questioning Mr. Ambrose under 21(j) or as his own witness?

(Testimony of Laurence C. Ambrose.)

Mr. Shapro: He isn't my witness. I am cross examining him. They called him as their witness.

Mr. Dole: This is 21(j), Mr. Shapro. We didn't [27] call him as our witness. We called him under 21(j).

Mr. Shapro: As far as I am concerned, this is cross examination of the witness. It's called redirect, I know, where the witness is called under cross, but unless it is the client of the party calling him, it is cross examination.

The Referee: Now, so the Court at this time will afford itself of the opportunity of getting the record straight and my question is directed to Mr. Fazio's counsel, Mr. Ambrose's counsel and counsel for the trustee, may everything that has been asked and answered up to now be considered with reference to the objections on both claims?

Mr. Shapro: Yes, your Honor.

Mr. Dole: Yes, so stipulated.

Mr. Crews: Yes.

The Referee: Now, Mr. Shapro, your contention is that even though the witness was called under 21(j) on your client's claim that you have the right to examine him further.

Mr. Shapro: That's right, your Honor.

The Referee: And the testimony may stay.

Mr. Walsh: I'm not objecting to the testimony for the record, your Honor; I am trying to get the record straight is all calling the witness as his own witness or on cross examination. [28]

(Testimony of Laurence C. Ambrose.)

The Referee: Mr. Shapro's contention is that he is calling him on redirect.

Mr. Walsh: Redirect, just to keep the record clear, that's all.

The Referee: Now, Mr. Walsh or Mr. Dole, do you have any further questions?

Mr. Dole: I think I will ask a couple more questions.

Q. (By Mr. Dole): The secretary of the corporation, Leonard Plumbing & Heating Supply Company, Inc. would have prepared an application to the Corporation Commissioner for a permit to issue securities. A. Yes.

Q. Do you have a copy of that application?

A. Well, I wouldn't have it. The attorney would have it.

Mr. Shapro: I have it, Mr. Dole; I gave you a copy of it.

Mr. Dole: May I have a copy of that?

Mr. Shapro: I gave it to you.

Mr. Dole: I have the photostatic copy.

Mr. Shapro: Well, I don't have the original, either. I copied it from Mr. Gericke's file copy which I have here.

Q. Is this a copy of that application?

A. Yes, as far as I know.

Q. Did you sign the original of this application?

A. Yes. [29]

Q. And was this duly submitted to the Commissioner of Corporations? A. That's right.

Q. Did you have prepared as exhibits with this

(Testimony of Laurence C. Ambrose.)

application a balance sheet and profit and loss statement for the year immediately preceding the filing of this application?

A. I wouldn't know; the attorney handled that.

Q. If you were advised in this application that such was an exhibit, would you say that such a financial statement had been prepared and submitted as a part of this? A. I wouldn't know.

Mr. Shapro: For the record, so that there may be no misunderstanding, I have obtained previously and furnished to counsel copies or certified—and a certified copy of Exhibits A & F referred to in the application.

Mr. Dole: I have never seen them.

Q. Did you receive a permit from the Corporation Commissioner, Mr. Ambrose? A. Yes.

Q. Do you have a copy of that permit?

A. I don't have it here unless it's in the books.

Mr. Shapro: I have a duplicate-original of the permit of which I have previously given you a copy, your Honor. I want the record to indicate that if counsel is doing this—asking these for the purpose of comparing these with the photostatic copies, I furnished him, I have no objection. [30]

Mr. Walsh: Your Honor please, let's get the record straight. Mr. Shapro represented the bankrupt. He represents Mr. Fazio and if he has any copies or any documents, we're entitled to see them.

Mr. Shapro: You have already been given copies of them.

Mr. Dole: Is that a copy?

(Testimony of Laurence C. Ambrose.)

The Witness: Yes.

Q. And this permit is dated June 20, 1953.

A. That's right.

Q. Did you subsequently prepare and issue certificates of stock pursuant to this permit?

A. There's stock certificates, yes.

Q. And what date did you issue the stock certificates? A. I can't recall the dates.

Q. It would be after the date January 20, would it not? A. I assume it was.

Q. Did you have a profit and loss statement—a balance sheet prepared approximately as of the date you issued the stock certificates?

A. I don't know.

Q. Who would know that?

A. The attorney who made these.

Mr. Dole: I would like to introduce in evidence the permit from the Corporation Commissioner, your Honor.

Mr. Shapro: Well, your Honor, I have no objection [31] as long as I have the right to withdraw it, to make another photostat, having given counsel a copy already.

Mr. Dole: So stipulated.

The Referee: Mr. Dole, you are offering this as Objecting Trustee's No. 2, did you say in evidence?

Mr. Dole: In evidence.

The Referee: So ordered.

(The paper referred to was received in evidence by the Referee and marked "Trustee's Exhibit No. 2 in evidence.")

(Testimony of Laurence C. Ambrose.)

Mr. Dole: I have no further questions of Mr. Ambrose.

Mr. Shapro: Just a minute. As long as the matters have been gone into on examination of this witness, at this time on behalf of the claimant, Fazio, I offer in evidence the copy of the application for the permit about which counsel has interrogated the witness, together with certified copy of Exhibits A & F therein referred to.

The Referee: As one exhibit.

Mr. Shapro: Maybe because one is certified, they better be offered separate. The application first, your Honor.

Mr. Dole: I should think—well, that's all right.

The Referee: Mr. Chew, do you want to join in this offer of the claimant Fazio on behalf of the claimant Ambrose? [32]

Mr. Chew: Yes.

The Referee: So then I'll mark the application as Claimant's No. 1 in evidence.

(The paper referred to was received in evidence by the Referee and marked "Claimant's Exhibit No. 1 in Evidence.")

Mr. Dole: May I see the exhibits, Mr. Shapro?

Mr. Shapro: Surely.

(Discussion off the record.)

The Referee: Mr. Shapro, this next set of documents.

Mr. Shapro: Is a certified copy of Exhibits A & F filed with the Commissioner of Corporations as a part of the application, which is Claimant's No. 1.

(Testimony of Laurence C. Ambrose.)

The Referee: This will be Claimant's No. 2 in evidence.

(The paper referred to was received in evidence by the Referee and marked "Claimant's Exhibit No. 2 in Evidence.")

Q. (By Mr. Shapro): Mr. Ambrose, who was the attorney that represented the corporation in connection with its incorporation and the application for permit to issue stock?

A. Mr. Gericke, I think.

Q. Mr. Gericke. And did the corporation have an accountant at the time of its incorporation?

A. Yes.

Q. And did the partnership have an accountant up to the time of the incorporation? A. Yes.

Q. And who was that accountant?

A. Laborde & Fischer. [33]

Mr. Shapro: No further questions.

The Referee: Mr. Dole and Mr. Walsh or Mr. Chew and Mr. Crews, we are considering both claims.

Mr. Chew: Are we considering all these together?

The Referee: Yes, but you are not bound at this time to examine Mr. Ambrose. You can call Mr. Ambrose later on and develop anything.

Mr. Chew: I would rather do that.

The Referee: You would rather do that.

Mr. Dole: Mr. Shapro, this is a balance sheet which is in somewhat different form than that which you have just introduced in evidence. Would you

(Testimony of Laurence C. Ambrose.)

have any objection to the introduction of that balance sheet?

Mr. Shapro: None whatsoever.

Mr. Dole: Mr. Crews and Mr. Chew, would you have any objection to the introduction in evidence?

(Discussion off the record.)

Mr. Crews: I have no objection.

Mr. Dole: I will introduce that in evidence then as trustee's next in order.

The Referee: Trustee's No. 2.

Mr. Shapro: No. 3, your Honor, may I suggest?

The Referee: Yes, No. 3 is correct.

(The paper referred to was received in evidence by the Referee and marked "Trustee's Exhibit No. 3 in Evidence.") [34]

Mr. Dole: I guess that one for identification has gone in then.

The Referee: The minute book has not gone in. It's marked for identification.

Mr. Shapro: The claimant Fazio will offer in evidence—excuse me, I'm sorry.

The Referee: You have this balance sheet dated October 1, 1952 and it's marked Objecting Trustee's No. 3 in evidence. Now, Mr. Shapro.

Mr. Shapro: Your Honor, the claimant Fazio will now offer in evidence the minute book which has previously been identified as Trustee's No. 1 for Identification and offer it in evidence.

Mr. Crews: That may be joined in by both.

The Referee: As Claimant's No. 3 in evidence.

Mr. Dole: What is that?

(Testimony of Laurence C. Ambrose.)

The Referee: The minute book. It's previously marked Objecting Trustee's No. 1 for Identification. You gentlemen have it.

Mr. Dole: May I see Fazio's No. 2, your Honor?

The Referee: Yes.

Q. (By Mr. Dole): Mr. Ambrose, how much stock do you own in Leonard Plumbing & Heating Supply Company? A. Two Hundred shares.

Q. And how much percentage-wise does represent of the [35] stock issued? A. One-third.

Q. And what was the consideration you paid for that stock? A. Value of \$10.00 per share.

Q. Did you pay cash for that stock?

A. Taken out of the—sure it was paid cash.

Q. And what date and what time did you pay the cash?

A. Well, we paid it at the time the stock was issued. It was cut down from the money in the business I had coming to me.

Q. Do you have cancelled checks such as these?

A. That has nothing to do with that. That's just a different transaction altogether.

Q. Oh, you didn't pay cash then for that stock?

A. Well, if I didn't buy the stock these would be higher. The difference would have been \$2,000.00.

Q. Now, explain what you paid for the stock please, if you will, sir.

A. When the thing was formed into the corporation, we bought two hundred shares.

Q. What did you pay for the stock?

A. Ten Dollars per share.

(Testimony of Laurence C. Ambrose.)

Q. And what as that Ten Dollars per share represented by? A. Two Thousand Dollars.

Q. Two Thousand Dollars. How did you pay the Two Thousand Dollars?

A. When the business was formed over in a corporation, it [37] was cut down from what I had in that business then more than that difference but we did make a profit one year, you know, and the money all stood in the business; nobody took any money out of the business. When that business was started, we didn't take out one penny out of that business. I'll take it back—\$150.00 since the business started.

Mr. Crews: Mr. Ambrose, I suggest when you answer the questions, don't say "we" but say who, if any, took money out of the business.

The Referee: You didn't make any money; you drew the hundred and fifty.

The Witness: Nobody took any money out of the business. All laid in the business all the time.

Q. Mr. Ambrose, as a matter of fact, you didn't pay any cash for that stock, did you; it was just a transfer of the assets and liabilities of the business for the stock.

A. It was my share of the profits during the business at the time it was in the partnership business. Then we formed the corporation, naturally, I bought Two Thousand Dollars worth of stock. If I would have got out of the business, they would have gave me Two Thousand Dollars plus this, wouldn't they?

(Testimony of Laurence C. Ambrose.)

Q. (By the Referee): Well, Mr. Ambrose, isn't this what you have in mind? You had an interest in the partnership.

A. That's right.

Q. You were one of the partners.

A. That's right.

Q. And according to your understanding, that interest you [38] had in the partnership was worth something.

A. It was worth—that's right.

Q. And when the corporation was formed, for your interest in the partnership, you received so many shares of the stock.

A. That's right.

Q. Isn't that exactly what it is?

A. That's right, that's exactly.

Mr. Dole: That's all.

Q. (By Mr. Shapro): Mr. Ambrose, in response to the Court's question, which was the last question just asked that for your interest in the partnership you received stock, did you mean to imply that for your entire interest you received stock?

A. No. No, just part of my interest.

Q. And for the balance you received the note.

A. That's right.

Q. This promissory note for the balance.

A. That's right.

Q. (By Mr. Dole): And you left just Two Thousand Dollars representing your interest.

A. That's right, plus the loan.

Q. And the secretary of the corporation then—I gather then that Mr. Fazio did the same thing; he

(Testimony of Laurence C. Ambrose.)

left Two Thousand Dollars of his account in the organization and took a note for the rest.

A. That's right.

Q. And the other partner, Mr. Leonard, the same thing happened. [39]

A. That's right.

(Discussion off the record.)

Mr. Chew: Your Honor please, I would like to offer into evidence both of these notes, the first one dated September 15, 1952 in the amount of \$4,451.00 17/100 dollars by the Leonard Plumbing & Heating Supply Company signed by J. A. Fazio, B. T. Leonard and Laurence C. Ambrose. I would like to have this one admitted into evidence.

The Referee: Claimant's No. 4 in evidence.

Mr. Walsh: For the purposes of identification, that is the co-partner's note.

The Referee: September 15, 1952 in the amount of \$4,451.17, Claimant's No. 4 in evidence.

Mr. Chew: Also, if your Honor please, I would like to put into evidence this note which I have in my hand here in the amount of \$4,051.17 dated October 1, 1952 between Leonard Plumbing & Heating Supply, Incorporated signed by J. A. Fazio, B. T. Leonard and Laurence C. Ambrose.

The Referee: Claimant's No. 5 in evidence.

(The papers referred to were received in evidence by the Referee and marked "Claimant's Exhibit No. 4 and 5 in evidence," respectively.)

Mr. Crews: Let the record show that that's a corporate note that was issued. [40]

The Referee: Is that all of Mr. Ambrose?

Mr. Dole: I have no further questions.

(Discussion off the record.)

The Referee: Thank you very much, Mr. Ambrose, temporarily. You may be called again by your own attorney or Mr. Shapro.

Mr. Dole: I would like to call Mr. Clifford V. Heimbucher.

CLIFFORD V. HEIMBUCHER

called as a witness on behalf of the objecting trustee, being first duly sworn by the Referee, testified as follows:

Q. (By the Referee): Your full name?

A. Clifford, V. for Victor, H-e-i-m-b-u-c-h-e-r.

Q. And, Mr. Heimbucher, where do you reside?

A. I reside at 2900 Garber Street in Berkeley.

Q. And your business or occupation?

A. I'm a certified public accountant and management consultant.

The Referee: Thank you.

Direct Examination

Q. (By Mr. Dole): Mr. Heimbucher, in connection with your profession, where do you carry on that business?

A. I maintain my office in San Francisco. [41]

Q. And what is the name of your firm?

A. The firm is Farquhar & Heimbucher.

Q. Are you a partner in that firm?

A. Yes, I'm a partner.

Q. And does the management consultant activities of your concern operate under the same name?

(Testimony of Clifford V. Heimbucher.)

A. That is correct.

Q. Are you associated with any other firms in like business?

A. Yes. I also serve as resident manager for Scovell, Wellington Company; that's S-c-o-v-e-l-l W-e-l-l-i-n-g-t-o-n and Company, a national firm.

Q. Now, are you licensed to practice your profession in the State of California, Mr. Heimbucher?

A. I am.

Q. And when were you so licensed?

A. I received my CPA certificate in California in 1937.

Q. Of what college or university are you a graduate?

A. I am a graduate of Columbia University.

Q. And had you had professional or had you had post-graduate work? A. Yes, I did.

Q. And where and when was that?

A. At Columbia University.

Q. Do you belong to any professional organizations or associations in connection with your professional activities?

A. Yes. I'm a member of the American Institute of Accountants, the California Society of CPA's, the New York Society of [42] CPA's and the Washington Society of CPA's.

Q. And have you ever occupied any offices or any positions in any of the societies which you have just mentioned?

A. I am a past president of the California Society of CPA's and also of the San Francisco Chap-

(Testimony of Clifford V. Heimbucher.)

ter of that organization, and a past member of the Council of the American Institute of Accountants.

Q. Now, Mr. Heimbucher, in the course of the activities, I believe you have mentioned it as business management, consultant, is that correct?

A. Management consultant.

Q. Management consultant and CPA. Are you familiar with the problems involved, the capital requirements of beginning businesses and particularly of new corporations?

A. Yes, I've had considerable experience in that field.

Q. And are you able on inspecting the opening financial statements of a new corporation to form an opinion as to the adequacy of the capitalization of that concern?

A. I believe so.

Q. How many beginning businesses have you analyzed with respect to your professional activities?

A. I couldn't answer that precisely but it would be a large number.

Q. I understand that. Now, Mr. Heimbucher, I am going to show you now defendant Fazio's—

The Referee: Pardon me, Mr. Dole, before you do, Mr. Shapro or Mr. Chew or Mr. Crews, do you gentlemen [43] desire to ask any questions with reference to the witness' qualifications?

Mr. Shapro: Yes, your Honor.

Q. (By Mr. Shapro): Have you ever analyzed the opening accounts and balance sheets of a corporation engaged in the plumbing supply business?

(Testimony of Clifford V. Heimbucher.)

A. Not that I recall in that particular field, no.

Mr. Shapro: I have no further questions at this time.

Q. (By Mr. Dole—Continuing): Mr. Heimbucher, have you ever analyzed the opening financial statements of concerns engaged in the sales and distribution of goods, wares and merchandise?

A. A substantial number.

Mr. Shapro: I have another question.

Q. (By Mr. Shapro): Mr. Heimbucher, isn't it a fact that the capital requirements of corporations engaged or to be engaged in the sale of various or different types of goods, wares and merchandise in their differences vary? A. Yes.

Q. And if services are sold in connection with or along with goods, wares and merchandise, such a business has a different capital requirement, does it not, from one which is not so engaged?

A. That is correct. Those are all elements to be taken into account. [44]

Q. And the nature of the business—by that I mean the nature of the merchandise itself which is to be sold, is a factor, is it not? A. Yes.

The Referee: Mr. Crews?

Mr. Crews: I was wondering if the State of California Corporation Commissioner at the time this corporation was formed, do they have any minimum requirements for stock—capital requirements?

The Referee: The Court won't rule about that question; I am only concerned now with reference

(Testimony of Clifford V. Heimbucher.)

to the examination pertaining to the witness' qualifications because it appears to the Court that he is going to attempt to give testimony as an expert witness and the Court wants to be satisfied that counsel is satisfied that he is an expert. Now, merely with reference to those type of questions, the Court will hear from either Mr. Crews or Mr. Chew.

Mr. Crews: I'll withdraw that question.

Mr. Shapro: I am not conceding the witness' qualifications, your Honor.

The Referee: I understand, Mr. Shapro, but you have temporarily passed——

Q. (By Mr. Dole—Continuing): Mr. Heimbucher, I will ask you further questions along this subject. Mr. Shapro has raised certain questions about the fact that requirements of a hard goods concern are different [45] from those of a soft goods concern and also where services are rendered by the concern they have special requirements. In the course of your activities in studying and analyzing financial statements of various types of concerns, have you had occasion to take into consideration those various factors which Mr. Shapro has mentioned?

A. I would say that in almost every analysis those factors must be taken into account. That is part of the analysis.

The Referee: Well, the fact whether they do or do not, whether they must or must not—the question is have you——

A. Oh, I'm sorry; yes.

(Testimony of Clifford V. Heimbucher.)

Q. Now, Mr. Heimbucher, I will show you defendant Fazio's Exhibit No. 2, the exhibits submitted with the application to the Corporation Commissioner and I call your attention particularly to the comparative profit and loss statements for the years ended September 30, 1949, 1950, 1951 and 1952 for the Leonard Plumbing, Heating & Supply and also the comparative balance sheets for the same years of Leonard Plumbing & Heating Supply Company and ask you if you have ever seen those before?

A. I haven't seen these particular copies but I believe I have seen another copy of the first statement.

Q. Actually, Mr. Heimbucher, the document that I let you inspect before was a pencilled document.

A. That is correct.

Mr. Dole: Do you concede, Mr. Shapro, that these are identical? [45]

Mr. Shapro: I do.

Q. Mr. Heimbucher; I wish also to show you Trustee's Exhibit No. 3, the opening balance sheet dated October 1, 1952 and ask if you have ever seen that document before, Mr. Heimbucher?

A. Yes, I have.

Q. And I believe that was in your office both yesterday and several days prior to that when I showed those documents to you.

A. That is correct.

Q. From those statements which you have in your hand, Mr. Heimbucher, are you able to form

(Testimony of Clifford V. Heimbucher.)

an opinion as to the adequacy of the capitalization of Leonard Plumbing & Heating Supply, Inc.?

Mr. Shapro: Your Honor, if the witness is directed to answer the question yes or no and no other, I will have no objection.

The Referee: He is directed.

A. Yes.

The Referee: You are familiar.

The Witness: Yes.

The Referee: And before you answer this next question, afford Mr. Shapro an opportunity to——

Q. As revealed in these statements, what would you say is the actual usable amount of capital available to this concern?

Mr. Shapro: I am going to object to that question, if your Honor please, upon the ground it's incompetent, irrelevant and immaterial, no proper foundation laid. I take the position, if your Honor please, first, in [46] connection with the objection that it's neither incompetent, irrelevant or immaterial, the subject-matter of this inquiry is not the *property* subject of expert testimony. Secondly, this witness is not qualified by his own admissions to pass an opinion upon the capital requirements of a business such as this because he has never analyzed, among other things, he has never analyzed the capital requirements of a business such as that in which Leonard Plumbing & Heating Supply Company was engaged, namely, the sale of plumbing supplies. He has testified that the nature of the consideration is an element—the nature of

the merchandise to be sold is an element in the determination of such a thing. Going back, if I may, your Honor, to the first objection, whether or not a business has or has not an adequate capital is not the subject of expert testimony, in my opinion where as in this case the nature and consideration of the objection are these (I am referring now to page 2 of the trustee's objections to the claim of Mr. Fazio): That the amount set forth in the claim filed by said J. A. Fazio (I'm reading beginning line 21, gentlemen) represented a portion of the capital investment in said copartnership, that at the time said business was incorporated, all of the capital investment, including that of said J. A. Fazio, was converted from the partnership capital account to an account entitled "loans from [47] copartners," that in truth and fact this transaction was a scheme and plan to place said copartners in the firm of Leonard Plumbing & Heating Supply and the bankrupt corporation thereafter organized Leonard Plumbing and Heating Supply, copartnership, that if said claimant is permitted to share in the assets of said bankrupt now in the hands of the trustee in the same Leonard Plumbing & Heating Supply, he will receive a portion of the capital invested which should be used to satisfy the claims of creditors before said bankrupt"; and on the subject further, your Honor, that no proper foundation has been laid for this question or the question of this—the pending question to this witness, in addition to what I believe would be a failure to show adequate qualifications, there has been no

showing here if the Court please, that any of the creditors of the bankrupt corporation who were such at the time of the organization of the corporation, the issuance of the stock and the transfer to the corporation of the assets of the partnership still remain creditors, and I make the objection, if your Honor please, upon each and all of the grounds I stated.

The Referee: With reference to the last objection that you made, the Court will sustain the objection. With reference to Mr. Heimbucher's qualifications, the Court will overrule your objection.

Mr. Walsh: Your Honor, so we may understand, the last objection was the one relating to the creditor?

The Referee: No showing that there were any creditors that were in existence.

Mr. Dole: That's correct. We will agree there.

The Referee: Gentlemen, this is a good time for me to break.

(Discussion off the record.)

The Referee: In any event, this is a good time for a recess. Mr. Heimbucher, the Court is responsible for you requiring to return, not the attorneys, and if you will excuse me, we will try to arrange a date that's agreeable all around.

Mr. Walsh: Your Honor please, before you make that ruling of sustaining the objection, may we have an opportunity of arguing the law on that before you sustain the objection?

The Referee: The Court will listen to your argument. In other words, Mr. Shapro will not

have to restate the objection because it's in the record. And I will hear from you gentlemen.

Mr. Walsh: Then for the record, it's considered that you are sustaining the objection at this time.

The Referee: I am sustaining the objection but I am going to afford counsel for the objecting trustee an opportunity to convince the Court that it's wrong [49] immediately upon adjourning.

Mr. Dole: The thing of the objection only went, so far as the statement of Mr. Shapro is concerned, that it hasn't been shown that there were creditors in existence now who were creditors of the partnership.

The Referee: Correct. I sustained his objection on that basis.

Mr. Dole: I don't argue that point.

The Referee: Then we are in accord. And as far as Mr. Heimbucher's qualifications are concerned, I overruled Mr. Shapro's objection against it that he is an expert witness.

Mr. Dole: Yes, Mr. Heimbucher can come back and testify.

The Referee: Correct.

(Discussion off the record.)

The Referee: Continued to January 25 at 10:00. And for the record, gentlemen, what is your desire with reference to the exhibits? Mr. Shapro at one time stated that he be allowed to withdraw an exhibit or exhibits.

Mr. Shapro: There is only one I would like to withdraw for the purpose of having a photostat prepared.

The Referee: Let the record show that Mr. Shapro has withdrawn the permit which is——

Mr. Shapro: Which is No. 2—Objector's No. 2—[50] and I would also like to withdraw for the same purpose, Claimant's No. 1.

(Discussion off the record.)

Mr. Shapro: I would like the same privilege with respect to Claimant's No. 1, your Honor.

The Referee: How about the objecting trustee?

Mr. Dole: There is nothing I wish for use, your Honor.

The Referee: The Court then is omitting the minute book; the exhibits will be available to counsel on either side at my office.

Mr. Dole: And then you will instruct all witnesses under subpoena to appear again.

The Referee: All witnesses are instructed to return—all those witnesses who have been subpoenaed, and the record at the start indicated that Mr. Leonard was not present but the Court sees Mr. Leonard present.

Mr. Shapro: I asked Mr. Leonard and had conveyed a request that Mr. Leonard appear. He is not under subpoena. I have no desire for him to return.

Mr. Dole: He is not under subpoena.

Mr. Shapro: Then Mr. Leonard may be excused.

The Referee: As far as both sides are concerned, Mr. Leonard you are excused. If you desire to remain, you may do so. January 25th at 10:00.

(The hearing was adjourned until January 25, 1956 at 10:00.) [51]

January 25, 1956—10:00 A.M.

The Referee: In the matter of Leonard Heating & Plumbing, let the record show that the same appearances are present and at the conclusion of the last hearing, counsel for the objecting trustee reserved the right and the Court granted the right to attempt to convince the Court that the Court was in error with reference to sustaining the claimant's objection with reference to the introduction of certain testimony.

Mr. Dole: Well, your Honor, let me understand here. You are permitting the testimony to go into the record——

The Referee: Well, first of all, Mr. Dole, the Court made a ruling. Mr. Shapro made four or five objections to the question and the line of testimony and the Court overruled all of his objections except one and sustained the objection with reference to creditors in existence.

Mr. Dole: That's correct.

The Referee: And after the Court made its ruling, Mr. Walsh requested that you and he be afforded an opportunity to have the Court change its mind with reference to sustaining the objection on the ground of the creditor in existence. Is that as you recall it, Mr. Walsh?

Mr. Walsh: Yes, that's correct. [52]

Mr. Dole: That's as I recall it, too. If the objection had been overruled on other grounds, then that permits us, as to those grounds—that permits this testimony to go into the record, is that correct?

The Referee: Correct, but in the event that you

gentlemen have nothing further to offer, the Court is going to make a change in its ruling and also a suggestion because once again I am only interested in all of the information and testimony that I can receive. And I will permit Clifford Heimbucher to *testimony* and I will overrule all of Mr. Shapro's objections and I will permit Mr. Shapro and Mr. Crews and Mr. Chew to call, in the event they so desire, the same type of an expert to counteract any testimony given.

Mr. Dole: Yes. Very well. Mr. Heimbucher, would you come forward please?

The Referee: Let the record show that Mr. Clifford V. Heimbucher is on the stand and he was previously sworn.

CLIFFORD V. HEIMBUCHER

having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Dole—Continued): Mr. Heimbucher, we had examined you with regard to qualifications previously but I will ask you one more question in that line, and that is, in your dealings with other [53] businesses and in considering the financial structure of beginning corporations, had you ever dealt with companies engaged in the so-called hard goods, that is, goods similar to plumbing and heating supply houses?

A. Yes, a very large number.

Q. And what sorts of companies were those?

(Testimony of Clifford V. Heimbucher.)

A. Well, one particular one that I think I did is quite close in nature is the wholesaling of electrical equipment and supplies.

Q. I see. Your Honor, at this time, could we have certain of the exhibits?

The Referee: Surely.

Q. (Continuing): I'm referring specifically now to Trustee's No. 3, Mr. Heimbucher; I believe you had these previously. A. That is correct.

Q. And is this one there identical to those—we already have the stipulation that the accountant's work sheet is the same as the Claimant's Exhibit No. 2, I believe—Trustee's No. 3. Are you familiar——

Mr. Shapro: It's the same as Trustee's No. 3. No. 2 is the permit.

Q. That's correct. Are you familiar with those documents, Mr. Heimbucher?

A. Yes, I have examined them before.

Q. You have examined them prior to this date. Mr. Heimbucher, from these statements, financial statements, are you able to form an opinion as to the adequacy of the capitalization of Leonard [54] Plumbing & Heating Supply Company, Incorporated? A. Yes, I believe so.

Q. Then what is your opinion generally as to the adequacy of the capitalization of that concern, the business herein?

Mr. Shapro: To which question, if your Honor please, we enter an objection upon each and all of the grounds heretofore urged to substantially the

(Testimony of Clifford V. Heimbucher.)

same question asked and objected to at the last hearing on the 17th of this month.

The Referee: Overruled. You may answer.

A. I would say that based upon my experience with similar size concerns that the opening capital is inadequate.

Q. From these financial statements, are you able to form an opinion as to the actual usable amount of capital available to this concern and at its inception?

Mr. Shapro: Same objections.

The Referee: Would you gentlemen be willing to stipulate that Mr. Shapro will have an objection to each and all of these questions without the necessity of so stating each of them and the Court will rule the same? And in the event that he has any other grounds of objection he can specifically state.

Mr. Shapro: That's agreeable with me, your Honor.

Mr. Dole: That's agreeable.

Mr. Shapro: The grounds are those stated at the last hearing, primarily. [55]

The Referee: Correct. The Court's ruling is that the objections are overruled. You may answer.

A. In terms of usable capital, I presume you mean the total usable capital which I would say is the amount of \$6,000, but going further as to working capital there doesn't seem to be any whatsoever because I know that the current liabilities exceeded the current assets so there is an actual

(Testimony of Clifford V. Heimbucher.)

deficiency in working capital on the opening day of business of the corporation.

Q. I see. And by how much is revealed on those statements to opening liabilities exceeding the assets?

Mr. Shapro: I submit, your Honor, the document is the best evidence.

The Referee: Sustained.

Q. Now, Mr. Heimbucher, based upon your experience in converting from a partnership to a corporation as this concern has done, have normal portions of the investment accounts been converted to capital and loans? A. I would say no.

Mr. Shapro: To that question, just a minute please, if your Honor please, in addition to the previous objections made and which are standing to this question, I object on the further ground that it calls for the opinion and conclusion of the witness in a matter of expert testimony. That is one of the very issues your Honor is going to have to pass upon in this case.

Mr. Dole: Obviously, in the first place, it does [56] call for the opinion of the witness. That is what the witness is here for—to give his opinion as an expert in this field. That's the very reason he has been called.

Mr. Shapro: If your Honor, if you listen to the question, you will see that he gave his opinion as to the inadequacy or alleged inadequacy of the opening capital. His opinion as to how much was usable capital, how much, if any, was working cap-

(Testimony of Clifford V. Heimbucher.)

ital. He is now being asked as to whether or not in the transition from the partnership to the corporation, the proper amount of capital was—the proper amount of working capital was transferred, that is the actual issue that your Honor is going to pass upon. It is true, your Honor please, that expert witnesses may give testimony on certain objections and your Honor has so ruled with, of course, due deference that we disagree. On the other hand, in this particular question he is asked—the witness is asked the very question that on—one of the very questions that your Honor is going to have to rule upon—the propriety of this transfer.

Mr. Dole: No, no, I beg to differ there. I merely asked him have normal proportions in a transaction such as this been converted to capital and loan accounts.

Mr. Shapro: I don't think that was your question, Mr. Dole.

Mr. Dole: Yes. [57]

Mr. Shapro: Maybe I misunderstood.

(The last question was read by the Reporter.)

The Referee: Sustained. The answer may go out.

Q. Now, Mr. Heimbucher, in converting from a partnership to a corporation has normal business procedure been followed with respect to the treatment of capital and investment accounts—of capital and loan accounts?

Mr. Shapro: To which question I urge the objection that no proper foundation is laid and that

(Testimony of Clifford V. Heimbucher.)

the subject matter of that question is not the subject of expert testimony.

The Referee: Overruled.

A. No.

Q. Will you explain your answer, Mr. Heimbucher?

A. I will explain it because in my experience generally in converting a business already in existence where the approximate amounts of permanent capital needed in the business have been established by experience, generally in converting to a corporation that amount of capital at least is in my setup as permanent capital in some form generally as common stock or preferred stock and only additional capital needed temporarily is normally set up as loans. But based upon the financial statements which I have before me, would seem that based upon several years' experience the amount of capital employed in the business was at all times substantially more than the \$6,000.00 employed in the opening of the corporation. [58]

Q. Then what deviations then, Mr. Heimbucher, from the portions normally assigned to capital and loans have taken place in this particular instance?

A. Only a very small fraction of the amount which would normally be considered permanent capital has been set up as permanent capital for the corporation and most of it has been set up as loans.

Q. I see. Do you have an opinion, then, Mr. Heimbucher, as to the reasons for these deviations from what we might call normal or good business

(Testimony of Clifford V. Heimbucher.)

procedure? A. Well, my—

Mr. Shapro: Just answer that yes or no, please.

The Referee: Do you have an opinion?

A. Yes.

Q. Would you state that?

Mr. Shapro: I object, your Honor please, upon the ground that it calls for the opinion and conclusion of the witness. That's the very question your Honor is going to have to answer in this case.

The Referee: Sustained.

Q. Mr. Heimbucher, from the financial picture that you have there as indicated by these various statements, would Leonard Plumbing & Heating Supply Company have a reasonable hope of financial success in this enterprise?

Mr. Shapro: I'm going to make an objection to that question upon the ground no proper foundation has been laid. There are too many items going into the hope of [59] financial success for this witness to qualify, particularly when he has never had any experience with the operation of a business even closely resembling this. In other words, his opinion as to capital generally and inadequacy is one thing; his opinion as to whether it has no hope of financial success calls for the opinion and conclusion of the witness, and also the conjecture of the witness.

The Referee: Overruled.

A. I would say it would have very little hope in view of the fact that for the year immediately preceding the opening of the corporation losses

(Testimony of Clifford V. Heimbucher.)

were running at a little less than \$2,000.00 a month on the average and starting with only \$6,000.00 capital it is quite apparent that barring some entirely new matter not apparent here, there would be practically no hope of success.

Q. I see. In your opinion, Mr. Heimbucher and again based upon these records that you have examined, would you say that this was a well-managed concern?

Mr. Shapro: I object to that question, if your Honor please, upon the ground no proper foundation is laid and it calls for the opinion and conclusion of this witness. This man is not a manager—a management consultant.

The Referee: Sustained.

Q. Could any of the deviations from normal business practice [60] and procedure in this financial statements that you have observed here be considered as evidence of poor management?

Mr. Shapro: I make the same objection, if your Honor please. That's an indirect way of accomplishing the same purpose.

Mr. Dole: Your Honor, I'm going to make an offer of proof at this time. As you perhaps have gathered at this point these objections are not based upon fraud. They don't turn upon the existence or non-existence of the debt which is involved. Rather, the only thing that we are concerned about here is the order of payment. Now, these objections as to subordination, these particular alleged creditors and the order of payment involved are based

(Testimony of Clifford V. Heimbucher.)

upon what is known as the Deep Rock Doctrine and this is sometimes known as the Doctrine of Equitable Subordination. Now, that doctrine was established in the case of Taylor against Standard Gas & Electric Company, it's a Supreme Court case at 306 U. S. 307, and in that case the court held that it would scrutinize the good faith and fairness of any transaction in which controlling shareholders of a corporation made loans to themselves and in the event there were accounts indicating loans to those controlling shareholders, it would subordinate those loans to the claims of other creditors in the event that concern had been inadequately capitalized. Now, the first case, that leading case of [61] Taylor against Standard Gas & Electric Company is known as a Deep Rock case because Taylor was a sole owner of a subsidiary known as the Deep Rock Oil Company and that involved the transactions between a parent and a subsidiary company. Now, just two years later, in the Supreme Court case of Pepper against Lytton, that's 308 U. S. 295, that same principle was supplied to the case of an independent shareholder and his transactions—controlling shareholder in line of his transactions in his own corporation. And in that case, the Court went on further saying that this was a case in equity in which the Bankruptcy Court had complete jurisdiction not only to decide the question of the Deep Rock Doctrine involved but any other equitable doctrine involved, the fairness and good faith of those shareholders in setting up the cor-

(Testimony of Clifford V. Heimbucher.)

poration originally. It went on to say also a matter which we haven't pressed here, that when objection has been made to the claim of a controlling shareholder in a close-held corporation that the burden of proof lies upon that shareholder to show his good faith of that transaction.

Mr. Shapro: If your Honor please, they undertook the burden and assumed it.

Mr. Walsh: Just a minute. To keep the record straight, I'll answer that question. We assumed the burden of going ahead and objection but when this question [62] comes up on the fairness and adequacy, the burden shifts to the claimant, if your Honor please; no question about that.

Mr. Shapro: There is a question.

Mr. Dole: So now, your Honor, we are not considering the existence or non-existence at this time; all we are considering here is the order of payment. In other words——

The Referee: The Court is in accord with everything you said, Mr. Dole, but I still sustain the objection. The Court naturally would——

Mr. Dole: Very well. I made my offer of proof.

The Referee: In any event, the Court will sustain the objection and as far as I am concerned, in my determination of this matter the question that you are asking now will not be a part of the record. However, for the protection of the objecting trustee, the answer may go in the record. Is that agreeable?

Mr. Walsh: That's agreeable.

(Testimony of Clifford V. Heimbucher.)

Mr. Dole: I should go on just a little bit further and show in these Supreme Court cases and in the other cases following they have usually said sometimes but not all the time inadequate capitalization is causeous with mismanagement of one form or another or poor management of one form or another and the Court has considered those aspects of the case as well as the [63] aspect of inadequate capitalization and that's the reason I asked Mr. Heimbucher these particular questions.

Mr. Shapro: I hope, may the record show, that by my silence I am not agreeing with all of the conclusions counsel has stated.

The Referee: The record may so show.

(The last question was read by the Reporter as follows: "Question: Could any of the deviations from normal business practice and procedure in these financial statements that you have observed here be considered as evidence of poor management"?)

A. Based upon the financial statements which I have, I would say that as far as financial management at least is concerned, the management was very poor.

The Referee: Well, now, just a minute. Even in the face of my sustaining the objection that question is not entirely responsive. He said as far as financial management is concerned. When you said that, do you want the Court to believe or your attorneys to believe that there are other types of

(Testimony of Clifford V. Heimbucher.)

management? For instance, running a job of hiring men and so forth, or why do you qualify it?

The Witness: What I have in mind is that there are many attributes of management and I am examining this from a financial standpoint and to me the [64] financial results indicate poor management.

The Referee: So your answer is on the financial management, is that right?

The Witness: That's right.

Mr. Dole: Now, there was one more question, I believe besides that one that you just read.

The Reporter: I don't have any other question.

Mr. Shapro: That's the last question.

Mr. Dole: I don't have any other questions.

Mr. Shapro: Your Honor may the record show—I am not trying to be overly technical—may the record show that in undertaking cross examination of the witness on items of testimony that he has given over our objection which your Honor has overruled that I am not waiving those objections?

The Referee: The record may so show.

Cross Examination

Q. (By Mr. Shapro): Mr. Heimbucher, you testified on direct examination that there was no working capital and you are basing all of your conclusions upon that information which you have testified and examined, namely, the comparative balance sheets, comparative profit and loss statements for the first two years and the opening balance sheet of the corporation, is that right, sir?

(Testimony of Clifford V. Heimbucher.)

A. That is correct.

Q. Now, if, Mr. Heimbucher — withdraw that. Working capital such as you have described as being in effect [65] non-existent in this case is used or would be required for what purpose in the business?

A. For financing all current operations such as the purchase of inventory, the accumulation of receivables, maintaining a cash reserve in the bank, paying payrolls.

Q. Having in mind, Mr. Heimbucher, that as of October 1 according to the balance sheet which you have before you, the inventory taken at the lower or cost of market was \$120,000 plus and if one hundred per cent of the credit sales of this corporation were available for immediate financing by the American Trust Company without any deduction of reserve, would you say that that would contribute to the acquisition or the having by the corporation of working capital? A. No.

Q. You would not. A. No.

Q. In other words, it's your testimony, Mr. Heimbucher, as a management consultant and a certified public accountant of some years' experience that having in mind the sales which you have seen from the comparative profit and loss statement of this business for the three years prior to its incorporation and having in mind the inventory that it had during the three years as a partnership and having in mind the inventory that it had as a beginning corporation and that all of those

(Testimony of Clifford V. Heimbucher.)
credit sales were available for a hundred per cent financing, financing on a hundred per cent basis, that you would say that would not contribute to the availability of working capital for that corporation, is that right? [66]

A. Well, working capital is the excess of the current assets over current liabilities. Financing of receivables really increases current assets and current liabilities by equal amounts and the net change or working capital is payroll.

Q. The net change or working capital as defined by an accountant from an accounting standpoint is still nil, doesn't increase. However, from the angle of working capital as defined in the practical sense as distinguished from the accountant's sense of the word, it would provide, would it not, Mr. Heimbucher, the availability of cash for the purchases, the cash for the payroll, the cash for operating expenses as long as the sales did not exceed the ratio that they would for the three previous years.

A. I'm sorry, I don't know any difference between the practical differentiation and the accounting differentiation.

Q. When you testified, Mr. Heimbucher, that there was very little hope of success of this business, did you also have in mind that although the partnership for the fiscal year ended September 30, '52 showed an operating loss of twenty-two thousand-odd dollars, that the same partnership made a profit of \$40,000 in the fiscal year '51 and made a

(Testimony of Clifford V. Heimbucher.)

profit of eighteen thousand, nine hundred for the fiscal year 1950?

A. Yes, I very definitely took that into account. To my mind that was an important factor because the trend seemed to me to be of considerable importance.

Q. You don't know what caused the trend.

A. No. [67]

Q. In other words, you don't know, for instance, and you could not therefore base the opinions you gave this court upon the reduction in sales from fiscal year '51 from \$665,000 to fiscal year '52 of \$389,000. A. No.

Q. Did you examine the relative percentages of gross profit on sales for the three years?

A. Yes.

Q. And did you find any substantial inconsistency?

A. I don't recall the figures on that point. I took them into account in forming my conclusions.

Q. Well, you have the figures in front of you, sir. Would you mind looking at them?

A. Over the period of four years there has been a gradual decline in profit in my opinion.

Q. Would you—— A gradual decline of profit in my opinion. That's ratio of gross profit to sales, is that right? A. That's right.

Q. Will you indicate to me the steps of the decline? In other words—— Withdraw the question. Take a look at the fiscal year September 30, '49

(Testimony of Clifford V. Heimbucher.)

and you will find \$29,000 gross profit or sales of one hundred twenty-eight,—

A. Which is approximately twenty-three per cent.

Q. Right. And you will find for '50, sixty-six thousand or 385.

A. Approximately 17 per cent.

Q. And in '51 you will find 107 or 665 which is about what? A. Sixteen per cent.

Q. Are you sure? A. These are— [68]

Q. Estimates. I'm not trying to hold you to an exact calculation, sir.

A. Approximately sixteen.

Q. And for fiscal year '50, fifty-three thousand on 389 in sales. A. Slightly under fourteen.

Q. The question that I asked you was whether or not in effect there was any marked difference between the three. Your answer—I mean, the answer that I have is that there is gradual reduction as indicated by these estimates that you have made.

The Referee: Your answer is yes, Mr. Heimbucher.

A. Yes, correct.

Q. In connection with your reaching the conclusions that you have testified to today, Mr. Heimbucher, did you take into consideration the identity of the actual management of this business?

A. By that do you mean the individual people?

Q. Yes, sir.

A. No, I do not know that.

Q. Did you take into consideration the fact that

(Testimony of Clifford V. Heimbucher.)

the management and I again mean personal, the individual, the personal management of this business was not—— Well, withdraw that. Did you take into consideration the personnel of management for any of the four years involved?

A. Not as individual people, if I understand you correctly.

Q. That's right. Did you know or do you now know the individual experience of the actual person or persons managing this business?

A. Only as reflected in the results of four years' operations. [69]

Q. And the results of four years' operations are those as indicated on the documents you have examined? A. That is correct.

Q. Have you ever seen—by seen, I mean come in personal contact—with in your personal activities a situation where a partnership business was converted into a corporation and any of the partnership capital was withdrawn from the business prior to incorporation? A. Yes.

Q. In cash or property? A. Yes.

Q. Have you ever run into a situation where the same thing was done by the converting of partnership capital into obligations? A. Yes.

Q. Of the corporation? A. Yes.

Q. And in all those cases have the businesses failed? A. No.

Q. In all those cases was the difference in your mind being the amount of capital left after the withdrawal or the conversion into obligations?

(Testimony of Clifford V. Heimbucher.)

A. May I ask are you asking me in all the cases where failures did not occur?

Q. Yes.

A. It is my opinion that the reason it didn't occur was because the capital proportions were different from this?

Q. Yes, that's my question, sir. You have stated it much better than I have.

A. The only word—I would answer yes, with one exception; [70] that the word "all" is a little different to cope with in that question. I don't think that I can apply—say that it's always true of any situation.

Q. In other words, Mr. Heimbucher, it is possible under conditions with which you have not been made familiar and which may have existed for this corporation to have succeeded despite the defects in its capital structure as opined by you.

Mr. Dole: Your Honor, I don't think that question is definite enough to be answered and object to it on that ground.

The Referee: Do you understand the question?

A. Yes, I think I already covered it in my answer to a previous question where I said that—I think I mentioned barring some entirely unexpected development. In other words, if this company were to have some wholly unexpected windfall of some kind then the result might be different.

Q. Having in mind——

The Referee: Pardon me, Mr. Dole, but you withdraw the objection, I assume.

(Testimony of Clifford V. Heimbucher.)

Mr. Dole: Yes, I do. (Laughter.)

Q. Having in mind, Mr. Heimbucher, that the partnership operations as indicated on Claimant's Exhibit No. 2, which is comparative profit and loss and balance sheets indicated a substantial profit for another year, a very small loss for the first year and a \$22,000 loss for the year preceding the incorporation and also having in mind that there was no withdrawal of [71] capital in the conversion of the partnership to the corporation but merely the evidencing of a substantial portion of the partnership capital in the form of notes and that those partners became the stockholders of the corporation, would that in any way affect your opinion as to the possibility of success of this corporation?

A. Only if the evidencing of a portion of their capital by notes was a mere matter of form and it was fully the intention to consider the efforts behind those notes as being permanent capital of exactly the same kind as the stock.

Q. And you have no such evidence brought before you in this case before you made your conclusions.

A. I'm not sure I understand.

Q. No evidence indicating that there was any intention to consider these notes by the noteholders as permanent capital.

A. Only if I could form an opinion from the fact that during the preceding four years that would be treated as permanent capital.

Mr. Shapro: No further questions.

(Testimony of Clifford V. Heimbucher.)

Redirect Examination

Q. (By Mr. Dole): Just one question, Mr. Heimbucher. Do you make a distinction between what you might call debt capital and invested capital? A. Oh, very definitely.

Q. And what is that distinction?

A. The distinction is that debt capital is an obligation to be paid before stockholders would receive on liquidation any [72] assets for their stock whereas invested capital is capital invested in the form of equity, namely, common stock or preferred stock, which would receive assets last on liquidation.

Q. Now, how much of the capital of this concern is represented by debt capital and how much by investments or invested capital?

A. As at September 30, 1952, namely, the last day of the partnership, the total invested capital would be approximately fifty-one thousand six hundred twenty dollars. On one day later, on October 1, 1952, on the opening of the corporation the invested capital would be six thousand dollars.

Q. And how much would the debt capital be?

A. The debt capital would be the difference—forty-five thousand, six hundred dollars.

Q. Would you consider then also any other outstanding indebtedness of the new business in arriving at that figure?

Mr. Shapro: May I have the question read?

(The last question was read by the Reporter.)

Mr. Shapro: Arriving at what figure?

The Referee: He is going to change the question.

(Testimony of Clifford V. Heimbucher.)

Mr. Dole: Yes, I can rephrase the question.

Q. Is that only considering the obligations, the notes taken by the individual shareholders themselves? A. Yes.

Q. I see. You are not considering any other obligations of the concern. A. No.

Q. Any other notes payable. A. No. [73]

Mr. Dole: No further questions.

Mr. Shapro: No further questions.

The Referee: Mr. Chew and Mr. Crews.

Mr. Dole: You may be excused, Mr. Heimbucher.
I would next like to call Mr. William B. Logan.

WILLIAM B. LOGAN

called as a witness by the objecting trustee, being first duly sworn by the Referee, testified as follows:

The Referee: I didn't hear the middle initial.

The Witness: William B.

The Referee: B like in Bernard. And your business or occupation?

The Witness: Business analyst, business consultant or the firm of—

The Referee: You don't have to go into those details but I assume that counsel will. But you are in that business and where is your business office located?

The Witness: 400 Montgomery Street, San Francisco.

Direct Examination

Q. (By Mr. Dole): Mr. Logan, what is the name of the business with which you are associated?

(Testimony of William B. Logan.)

A. The name of the company?

Q. Yes.

A. William B. Logan & Associates.

Q. And would you describe the nature of that business?

A. We're a combination of business analysts. I have a group of associates who are primarily retired executives, men [74] of forty or forty-five years assist in their particular field. We also act in the capacity of, you might say, professional managers in staying with a business for a period of a year or two years in guiding them. In several cases our staff is on the board of directors of some of these companies and we have them on a retainer whereby we serve on their management board, review their monthly operation and make suggestions for either improvement or continuous counseling.

Q. How long has William B. Logan & Associates been in existence?

A. About thirty years.

Q. Mr. Logan, where did you receive your college education?

A. I went to Lehigh University, B.S. Degree in industrial engineering.

Q. I see. And what generally has been your business background following your university education and preceding the organization of William B. Logan & Associates?

A. I did some work prior to that. I spent a couple of years in the service where I was an aircraft maintenance officer — administrative officer,

(Testimony of William B. Logan.)

and our primary jobs were to go to air bases and set them up, organize them, when they were organized why go off to another air base. I did some special work for Pan Am, La Guardia Field in setting up shop work, scheduling for the men some special work for Enterprise Engineering & Foundry Company in setting up production schedules and so forth. I had several years' experience—couple of years' experience with the National Business Consultant Firm as a business engineer [75] and for them considerable, I would say, research and study on small business management problems.

Q. Do you consider yourself in your business as specializing in the small business field?

A. Yes, I think actually that we are the only such organization in the country set up as we are and who have geared themselves to small businesses.

Q. Now, are you familiar with the businesses which deal in the sale and distribution of so-called hard goods?

A. Hard goods? Yes. I answer the question yes.

Q. Specifically, have you ever in your experience in the past dealt with businesses engaged in the sale and distribution of plumbing and heating supplies?

A. Yes, retail, wholesale and contractors.

Q. I see. To go back just a minute, are you a member of any professional organizations or associations?

A. Well, I was elected member of the American

(Testimony of William B. Logan.)

Institute of Management. That's the only one I have any time for principally.

Q. Now, Mr. Logan, are you familiar with the problems involved, the capital requirements of beginning businesses and particularly of beginning corporations? A. Yes.

Q. And are you able on inspecting the opening financial statements of a new corporation to form an opinion as to the adequacy of the capitalization of that particular concern? A. Yes. [76]

Q. Mr. Logan, I'm going to hand you here Claimant's No. 2——

The Referee: Before you do, Mr. Dole, have you completed with reference to Mr. Logan's qualifications?

Mr. Dole: I have.

The Referee: Mr. Shapro?

Mr. Shapro: I have no questions to ask the witness at this time. I do not at this point concede his qualifications because I first have to hear the professional questions that are going to be propounded to him. In other words, if he were an accountant, I would know it but he is not an accountant so I would have to wait until the questions are asked.

The Referee: Mr. Chew, do you feel the same way as Mr. Shapro?

Mr. Chew: Yes, your Honor.

The Referee: Mr. Crews?

Mr. Crews: I wouldn't concede that he is an

(Testimony of William B. Logan.)

expert for the purpose that they are calling him, not knowing what they are going to ask him.

The Referee: Very well.

Q. Now, Mr. Logan, I hand you Claimant's Exhibit No. 2 which consists of a comparative profit and loss statement and comparative balance sheet for the four years preceding the incorporation of Leonard Plumbing & Heating Supply Company, Incorporated, and I show you also the work sheet, Mr. Logan, from [77] which that statement was prepared. I think you will find they are identical. They have been stipulated to be identical by counsel involved.

Mr. Shapro: You may proceed on the assumption that they are because I agreed to it.

Q. (Continuing): Yes, and I also show you Objector's Exhibit No. 3. Now, Mr. Logan, I ask you if you are familiar with those statements?

A. I believe I have seen this one statement here.

The Referee: When you say—

The Witness: The balance sheet of October 1, 1952 and this comparative profit and loss statement from September '49 to September '52 and a comparative balance sheet for the corresponding period '49 to '52.

Q. Now, Mr. Logan, from these statements, are you able to form an opinion as to the adequacy of the capitalization of Leonard Plumbing & Heating Supply Company, Inc. at its inception?

Mr. Shapro: Before even that question is answered yes or no, your Honor, I would like the

(Testimony of William B. Logan.)

opportunity of examining the witness further on voir dire.

Examination on Voir Dire

Q. (By Mr. Shapro): Mr. Logan, in connection with your higher education at Lehigh University, to what extent, if any, did you study accounting or accounting methods?

A. I had two years of accounting there.

Q. Two years of accounting. Upper division or lower division? [78]

A. Through cost accounting.

Q. Will you answer my question? Upper division or lower division?

A. What do you mean by upper division or lower division?

Q. Lower division, as I understand, is freshman and sophomore — freshman and second year, and upper division is junior and senior.

A. First and second.

Q. First and second? A. Yes.

Q. Did you attend any other institutions of higher learning besides Lehigh University, sir?

A. No.

Q. And will you tell the Court please the nature of the accounting courses that you took in your first and second years at Lehigh?

A. That's going back a few years.

Q. By the way, how long, sir?

A. Oh, I finished there in '42.

(Testimony of William B. Logan.)

Q. You can't do it? You can't tell me the nature of the accounting? Your first year in accounting was elementary accounting, was it not?

A. That's going back a few years. It was, as I say, through cost accounting so it would cover going through general ledgers, setting up books and also setting up profit and loss statements and balance sheets.

Q. Then as I understand your testimony, during your career at Lehigh you took a lower division course or courses which included cost accounting, right? A. Right.

Q. Now, what accounting education have you had—I'm confining [79] it for the moment to education which you had since you graduated from Lehigh?

A. You mean formal or you mean personal training?

A. No, first formal. I am referring to education—formal—more than another. Have you worked in the field of accounting since your graduation?

A. Yes.

Q. Where and in what capacities?

A. Well, as far as a business analyst——

Q. Have you worked as an accountant for an accounting firm?

A. Well, may I ask as far as—there is a little difference between an accountant and a financial analyst.

Mr. Shapro: Yes, I realize there is, sir, and that is exactly why I am asking these questions.

(Testimony of William B. Logan.)

I would like to have the questions as asked answered, your Honor.

The Referee: Will you repeat that question?

(The last question was read by the Reporter.)

A. No.

Q. Have you worked in the office or accounting office doing accounting work for any business firm or corporation?

A. No.

Q. What experience, if any, have you had in analyzing profit and loss statements other than as a business analyst?

A. Well, you asked me the questions before if I worked for an accounting firm. The answer was no, so as far as other experience beside my own as a business analyst, no.

Q. Now, you have been a business analyst for how many years, sir? [80]

A. Since '47.

Q. Since '47. And you were employed, you stated, by a national business consulting firm. The name of that firm, sir, please?

A. George S. May Company.

Q. George S. May Company. And in what office?

A. San Francisco.

Q. And for how long?

A. A little better than two years.

Q. And what were the two years—what was the actual time?

A. '48 to '50—well, a little before then.

Q. And your business there was business engineer, I think you said.

A. Uh-huh.

Q. And tell the Court, if you will please, just

(Testimony of William B. Logan.)

what function you performed during those two years for the George S. May Company?

A. Went to various businesses throughout the western states, a combination of analyzing, setting up corrective measures, various types of management programs, getting financial assistance, organizational measures, personnel matters, production matters—well, before you're through there, why you got familiar with all sorts of business problems that would come up.

Q. As a matter of fact, Mr. Logan, during the first eight to nine months of your employment with the George S. May Company you never went out in the field without a supervisor, did you?

A. The first six months. [81]

Q. You always went out—you went in the field with a supervisor.

A. With a supervisor, that's right.

Q. And did you after the first six months always go in the field visiting clients of the May Company without anyone with you?

A. Yes, I had an engineer or two or three engineers with me.

Q. Did you ever have an accountant with you?

A. Yes.

Q. As a matter of fact, you had an accountant with you on all phases of your work with the George S. May Company which involved the analysis or financial structure or recommendations concerning such a client, isn't that true?

A. Yes and no.

(Testimony of William B. Logan.)

Q. Well, when I say you had him with you, I mean you didn't have him with you; you consulted your accounting staff at May Company before you prepared your report and recommendations, didn't you?

A. It all depended upon the nature of the problem.

Q. My question assumes, Mr. Logan, that the problems involved were financial. By problems I don't mean financial insolvency; I mean that one or more of the things for which the May Company was retained by its client was to give advice along financial lines.

A. Yes.

Q. Financial rehabilitation which is in connection with capitalization.

A. That's right.

Q. And so forth. Now, it's true, is it not, Mr. Logan, that in all instances in which you operated on behalf of the May Company under such system, that before your recommendations were [82] transmitted to the client of the May Company, the advice or the assistance or both of an accountant or a member of the accounting staff of May Company was always involved?

A. Yes, Mr. Shapiro, yes.

Q. Shapro is the name, sir.

A. Shapro, thank you.

Mr. Shapro: At this time, if your Honor please, I would like to object to the question propounded to the witness upon the ground that no proper foundation is laid, that it calls for the opinion and conclusion of the witness upon matters upon which

(Testimony of William B. Logan.)

the witness is not an expert. In other words, the question that is asked him is whether or not from the documents that he has before him which are comparative balance sheets, profit and loss statements and an opening balance sheet of the corporation, whether he can form an opinion as to the adequacy of the capital.

Mr. Dole: Your Honor, before passing upon the question, permit me to ask one or two more questions.

The Referee: Sure.

Direct Examination

Q. (By Mr. Dole—Continued): Just as a business analyst, Mr. Logan, how many small businesses and corporations have you analyzed?

A. Approximately 150.

Q. And in analyzing such businesses, is it necessary that you study the opening financial statements or the financial statements of those corporations? [83]

A. Yes, we make a study of both the profit and loss and the financial statements.

Q. And in doing that it is necessary that you have a thorough knowledge of procedures in setting up that accounting statement and what the various figures represent?

A. Yes. May I clarify that a little bit?

Q. Yes.

A. There's a little difference from your accounting as far as basic accounting as to the proper

(Testimony of William B. Logan.)

analysis of a financial statement. I can refer you to one source, Roy Fouke, who is the executive vice-president of Dun & Bradstreet, I think the world's leading financial analyst, he has set out fourteen financial ratios and there is a book out, "A Practical Analysis of a Financial Statement"; it doesn't go into accounting methods but it goes into the explanation of, as far as the various ratios that affect a balance sheet and the proper interpretation and the proper analysis of those various ratios so from a practical sense of seeing the balance sheets and following companies through and recommending to various companies as far as serious trends and their financial picture, then I would say, yes, I am certainly familiar with this particular financial information.

Q. Then as I understand your answer, it's your business to accept the figures as prepared by the accountants.

A. Yes.

Q. And as displayed upon the profit and loss statement and the balance sheet.

A. Correct. [84]

Q. And in accepting those figures to make your analysis.

A. Correct.

Q. Upon them as well as other factors.

A. (There was no answer.)

The Referee: He may answer. Overruled.

Mr. Dole: Go back to the question.

Q. The original question, I believe, Mr. Logan, was: From these statements are you able to form an opinion as to the adequacy of the capitalization

(Testimony of William B. Logan.)

of Leonard Plumbing & Heating Supply Company at its inception? A. I believe so.

Q. And as revealed in these statements, what would you say was generally the adequacy of the capitalization of that concern?

Mr. Shapro: May my objections to all this line of questioning go, as heretofore objected and stipulated to with respect to the line of questions asked of the witness Heimbucher?

Mr. Dole: That's agreeable.

The Referee: And with the same understanding that if there is an additional objection you will make it.

Mr. Crews: That would apply to Ambrose also.

The Referee: Very well. When Mr. Crews says he wants it to apply to Mr. Ambrose, he wants it understood that he and Mr. Chew have an objection along the same line as Mr. Shapro.

Q. As revealed in these statements, Mr. Logan, what would you say was the actual usable amount of capital available to [85] Leonard Plumbing & Heating Supply Company?

A. The usable working capital would be consisting of the capital stock. Now, from the accounting standpoint, your notes payable as far as the stockholders was strictly a balance sheet item; it was not usable working capital. From actual, however, a standpoint that assets had been transferred into the corporation from the partnership, those assets would, of course, be usable. From the standpoint of the capitalization of the company, the

(Testimony of William B. Logan.)

\$6,000.00, that, from a strictly balance sheet item would be all the capital, the key worth of the operation.

Q. Now, considering the size of this operation, Mr. Logan, would you consider the \$6,000.00 an adequate capitalization?

A. Definitely not. In 1952, that same year, of about 124 companies in this particular line, the average ratio of turnover of net worth of capital to sales ranged between three and five times. On this basis here, on \$6,000.00, with a sales of approximately \$400,000.00 it would have better than 60, 65-time turnover which certainly is quite a contrast from a three to five-time turnover.

Q. Is a sixty-times turnover feasible at all?

A. Impossible strictly from the capitalization standpoint.

Q. I see. In converting from a partnership to a corporation as this organization has, Mr. Logan, has normal business procedure been followed with respect to the treatment of capital and investment accounts?

Mr. Shapro: I object to the question as calling [86] for the opinion and conclusion of the witness.

The Referee: Sustained.

Q. From these financial statements which you have in your lap, Mr. Logan, did Leonard Plumbing & Heating Supply Company have a reasonable hope of financial success?

Mr. Shapro: Same objection, if your Honor

(Testimony of William B. Logan.)

please, and it also calls for the conjecture of the witness.

The Referee: Same ruling.

Mr. Dole: Your Honor, these are principally in substance the same questions as were asked Mr. Heimbucher.

The Referee: And you may proceed on the same basis. In other words, so the record will be straight.

Mr. Shapro: In other words, the objections were sustained but the Court allowed the evidence to go in on the basis that he would not consider it.

The Referee: You may continue with your examination, Mr. Dole.

Mr. Dole: Your Honor, rather than go through an offer of proof again as I have before, is it agreeable with the Court that the offer of proof that I made on behalf of Mr. Heimbucher can be made here?

Mr. Shapro: Deemed made as to this witness. Yes, certainly.

The Referee: And satisfactory to the Court.

Mr. Crews: Satisfactory to counsel on both sides.

Mr. Dole: Now, can I repeat the question? [87]

Q. Now, I'll repeat the two questions I just propounded to you, Mr. Logan. In converting from a partnership to a corporation, has normal business procedure been followed with respect to the treatment of capital and investment accounts? You understand my question?

A. Yes. The answer to your question would be that normal procedure has not been followed, no.

(Testimony of William B. Logan.)

Q. In what respect has it not been followed?

A. As far as the capitalization of the partner's assets go into a capital account—going into a notes payable as a liability. From the standpoint of similar experiences in talking to companies who may have been in the same position, it has always been our recommendation to never attempt to do that because you would have creditors' objections, number one. Again——

Mr. Shapro: Your Honor, with due respect to your Honor and your desire to have the record have an answer I move to strike out the answer of this witness on the ground it's not responsive to the question.

The Referee: Sustained.

Q. You may continue your answer. Do you recall the question that I asked—the specific question, Mr. Logan?

A. As far as the adequacy of the capital in transferring from a partnership to a corporation.

Q. Well, the original question was in converting from a partnership to a corporation has normal business procedure been [87(a)] followed with respect to the treatment of capital and investment accounts?

A. And I believe I said no to that.

Q. You answered no. A. Yes.

Q. What were the deviations specifically that you observed in the treatment of those accounts?

A. The transferring of the partner's capital accounts into the corporation as a notes payable or

(Testimony of William B. Logan.)

as a liability rather than transferring all or most of the amount and the capital stock.

Q. I see. Had all of the amount of the partner's investments in the partnership been capitalized in the corporation as a partner or in the stock would that have made adequate capital for the corporation considering the corporation?

A. It would have been closer to it.

Q. Closer to it. A. Yes.

Q. Do you have an opinion as to whether or not it would have been sufficient?

Mr. Shapro: Not in three to five times.

The Referee: That may stay in.

Mr. Shapro: Yes, your Honor.

A. The answer to that would be, I believe, that it would have been adequate providing that some of the operations—the operating phase had been improved upon.

Q. I see. And in your opinion then, Mr. Logan, based upon these records, would you say that this was a well-managed concern [87(b)] from the point of view of your specialty?

Mr. Shapro: I object to the question on the grounds it is incompetent, irrelevant and immaterial, calls for the opinion and conclusion of the witness. That's the very issue that your Honor is going to be called upon here to pass on and furthermore there is no foundation laid because the witness is basing—could base his answer only upon the accounts that he has before him.

(Testimony of William B. Logan.)

Mr. Dole: The issue is the order of payment of these debts, Mr. Shapro.

The Referee: I'll sustain the objection without prejudice to Mr. Dole asking some other questions. You are asking him whether or not it's a well-managed—it was a well-managed corporation?

Mr. Dole: Yes.

The Referee: Lot of things to take into consideration.

Mr. Dole: Yes, that's very true. I am referring now to his specialty as business analyst.

Mr. Shapro: Well, if your Honor please, certainly a business analyst goes into more than a balance sheet and a profit and loss statement before he reaches a conclusion.

The Referee: Still sustained.

Mr. Dole: I have no further questions.

Mr. Shapro: I have no questions of this witness.

Mr. Chew: I have no further questions either.

Mr. Dole: I would like to call Mr. John Curran.

JOHN S. CURRAN

called as a witness on behalf of the Objecting Trustee, being first duly sworn by the Referee, testified as follows:

The Referee: And your business or occupation, Mr. Curran?

The Witness: Now, as one of the associates of W. B. Logan & Company. I am retired vice-president of the Anglo California National Bank, the head office.

Direct Examination

Q. (By Mr. Dole): Mr. Curran, you have just stated that you are now associated with William B. Logan & Associates. How long have you been associated with them, sir?

A. Oh, I would say over the last three or four years.

Q. And in what capacity are you associated?

A. As an analyst.

Q. Prior to that you indicated that you were associated with the Anglo California National Bank.

A. That's right.

Q. How long had you been with the bank?

A. The Anglo Bank?

Q. Yes.

A. I joined it in 1917. I was previously with another bank in 1907. [89]

Q. And at the time you retired from the bank, what was your position, sir?

A. Executive vice-president.

Q. In what department or in what capacity?

A. Well, I am in the commercial end—general

(Testimony of John S. Curran.)

—I had other departments under me—the general department as well as the general commercial.

Q. In your experience in the bank and serving in your capacity as vice-president, did you have occasion to pass upon the adequacy of the capitalization of very small corporations? A. Yes.

Q. And in doing that, did you study the opening balance sheets, the profit and loss statement and the balance sheet of such businesses?

A. Yes.

Q. And for what purpose did you have to make those studies in your banking business?

A. For the purpose of whether or not they were entitled to any credit by the bank.

Q. Throughout your association with the bank, how many such businesses did you inspect?

A. I guess in all those years you would give statements because not that you personally loan on that particular one but it was our practice in the bank as executive officer to analyze and have the results of all of the statements that were passed upon where loans were made to them.

Q. Based upon your experience with the bank, do you consider yourself familiar with the problems involving the capital requirements of small businesses? A. Yes. [90]

Q. Particularly from a lending standpoint. And you consider yourself able on inspecting the financial statements of a new corporation to form an opinion as to the adequacy of the capital of that concern? A. Yes.

(Testimony of John S. Curran.)

Q. Mr. Curran, I hand you these statements that Mr. Logan has just inspected and that Mr. Heim-bucher has just inspected such statements being Trustee's Exhibit No. 3, the opening balance sheet of Leonard Plumbing & Heating Supply Company, Inc. and Claimant's Exhibit No. 2 being the comparative balance sheet of Leonard Plumbing & Heating Supply Company for the years '49, '50, '51, '52 and comparative profit and loss statement for Leonard Plumbing & Heating Supply Company for the same years and I also hand you the original work sheet of Mr. Laborde the accountant who prepared these which it is stipulated is identical or reflects the same material as the exhibit just referred to. I ask, Mr. Curran, have you ever seen those statements before? A. Yes.

Q. And you have inspected them and are familiar with them? A. Fairly.

Q. From these statements then, Mr. Curran, are you able to form an opinion as to the adequacy of the capitalization of Leonard Plumbing & Heating Supply Company at its inception?

The Referee: Mr. Curran, before you answer——

Mr. Shapro: I would like to ask Mr. Curran a question or two on voir dire, if I may, your Honor.

The Referee: You may. [91]

Voir Dire Examination by Mr. Shapro

Q. Mr. Curran, when did you retire from the Anglo? A. At the end of 1950.

(Testimony of John S. Curran.)

The Referee: And the answer will be either yes or no.

A. Yes.

Q. Would you state your opinion?

Mr. Shapro: May my same line of objection go to the testimony of this witness as has gone to the testimony of the preceding two witnesses throughout? May it be so understood?

The Referee: And the same with the claim of Mr. Ambrose.

Q. Will you state your opinion on that question?

A. Yes, my opinion is that looking at this statement here that it is inadequate.

Q. Do you have an opinion as revealed upon those statements as to the actual amount of usable capital to make available for that concern?

A. Well, they have, from a standpoint here—analysis—they haven't any working capital, which was explained before. Because of the fact that it is shown here that their current liabilities exceed their current assets. So, therefore, there isn't any working capital left for the corporation to work on.

Q. I see. Mr. Curran, in converting from a partnership to a corporation as this concern has done, has normal business procedure been followed with respect to the treatment of capital and investment accounts?

Mr. Shapro: To that question I add the specific objection that it calls for the opinion and conclusion of the witness.

(Testimony of John S. Curran.)

The Referee: Sustained. And may the same stipulation as previously——

Mr. Shapro: Yes, sir.

The Referee: And the witness may answer for the record. But the objection is sustained.

A. Would you ask the question again?

Q. In converting from partnership to corporation, has normal business procedure been followed with respect to converting the partner's investment accounts to the corporation investment and loan accounts? A. They haven't followed that.

Q. What is the normal business procedure?

A. I would say it is natural, unless you are going from a partnership into a corporation, that you would naturally transfer all of the capital invested in the partnership into a corporation judging of the fact that it was necessary to have that amount in the partnership, certainly it is such they would need that amount of money in the corporation and further they certainly wouldn't take, if there were loans in there, and put them in as a liability. Of course, in that procedure, they are naturally placing [95] themselves in the same position as their creditors and I would think and it is my humble opinion that apparently they didn't have enough confidence in the corporation to put it in as a capital——

Mr. Shapro: I move to strike out the answer of the witness upon the ground that it is not responsive to the question and it represents his conclusions.

The Witness: That was only an opinion.

(Testimony of John S. Curran.)

The Referee: The opinion may go out.

Q. Then I will ask the question—if I ask the question, what were the deviations from normal procedure in setting up a new corporation such as this has been set up, would your answer be substantially the same as you have just given?

A. That's right.

Q. And if I also ask the question if you have an opinion as to the reasons for these deviations from good business procedure, would you give me substantially the same answer as you gave me before?

A. Certainly.

Q. On the financial pictures indicated on these statements which you have inspected, Mr. Curran, do you believe that Leonard Plumbing & Heating Supply Company had a reasonable chance of success?

Mr. Shapro: I object to that on the ground it is incompetent, irrelevant and immaterial, calls for the opinion and conclusion of the witness and conjecture.

The Referee: Sustained. [96]

Mr. Dole: Is the answer subject to the same reservations?

The Referee: Yes.

Mr. Dole: You may answer that.

A. I would say it would be very problematical.

Mr. Dole: I have no further questions.

Mr. Shapro: I have no questions of this witness.

Mr. Crews: No questions.

(Discussion off the record.)

(An adjournment was taken until February 13, 1956 at 10:00 o'clock a.m.) [97]

February 13, 1956—10:00 A.M.

The Referee: Same appearances. And the objecting trustee is still putting on his case.

Mr. Dole: Yes. I would like to call Mr. Laborde.

The Referee: Mr. Laborde.

Mr. Dole: And this examination will be under Section 21(j).

ROBERT H. LABORDE, JR.

called as a witness by the Objecting Trustee under Section 21(j) of the Bankruptcy Act, being first duly sworn by the Referee, testified as follows:

The Referee: Your full name, Mr. Laborde?

The Witness: Robert H. Laborde, Jr.

The Referee: And your occupation?

The Witness: I'm a CPA.

The Referee: In business for yourself or employed by someone else?

The Witness: In business for myself.

The Referee: Mr. Dole?

Examination

Q. (By Mr. Dole): Mr. Laborde, of whom does your firm consist?

A. At the present time I'm the present owner.

Q. And what is your business address?

A. It's Fischer & Laborde, the Bank of America Building in Berkeley. [98]

Q. And Mr. Fischer has since——

A. He has passed away.

Q. He has passed away. You represent, I under-

(Testimony of Robert H. Laborde, Jr.)

stand, the firm of Leonard Plumbing & Heating Supply Company, Incorporated or you did until its dissolution?

A. Yes, we did. We took care of their books and so forth.

Q. I see. When did you first commence taking care of their books?

A. We began with them since the day they opened business.

Q. And when you say since the day they opened business, are you referring to opening business as a partnership or a corporation?

A. As a partnership.

Q. As a partnership. Do you remember approximately when that was?

A. It was around September of '48.

Q. I see. And in connection with the partnership business when did you first start representing them — what was the nature of your duties with them?

A. My particular duties?

Q. Yes.

A. Well, the office where I worked — at that time I was working for Brethauer & Fischer — they were caring for the books. We maintained a general ledger for awhile. Then we made up monthly statements — manual statements and income tax returns.

Q. I see. And while you were with Brethauer & Fischer, is that correct?

A. Yes.

Q. Were you assigned to Leonard Plumbing & Heating Supply Company? [99]

(Testimony of Robert H. Laborde, Jr.)

A. No, not as such. I worked on Mr. Fazio's books. Cared for the account and I supervised.

Q. Oh, I see. So you're familiar with his books then from the inception of the business?

A. Yes.

Q. What type of records did you have access to?

A. At Leonard?

Q. At that time.

A. Well, all of their books and records.

Q. All of their books and records. I see. I think I asked you when they were first organized. I didn't get your answer, sir.

A. I think it was sometime around September of '48.

Q. It does not matter; you don't have to specifically——

A. Yes, it was around September of '48.

Q. Who were the original partners?

A. The original partners were Bert Leonard and Laurence Ambrose and Joseph Fazio.

Q. And they are the same people who are the shareholders of the corporation, is that correct?

A. Yes.

Q. So the same people have carried through in the same business——

A. Yes.

Q. (Continuing): ——from the inception of the partnership to the time of dissolution. A. Yes.

Q. Which partner, or did he contact you first with reference to keeping the partnership books?

A. None of them contacted me particularly. I think they probably talked to Mr. Fischer.

(Testimony of Robert H. Laborde, Jr.)

Q. I see. And then the matter was turned over to you. A. Yes.

Q. With regard to keeping the partnership books, were you given any sort of agreement such as Articles of Partnership or an agreement with respect to partnership? A. No, we didn't—

Q. As a basis for your work?

A. No, we didn't have any articles of partnership in writing.

Q. In other words, your talks were strictly oral, is that correct? A. Yes.

Q. What were the original investments of the three partners in the business?

A. Mr. Fazio invested \$39,606.40; Mr. Ambrose invested \$4,000.00 and Mr. Bert Leonard invested twelve hundred.

Mr. Walsh: Mr. who?

The Witness: Bert Leonard.

Q. In what form did those investments take? Were they in the form of assets or were they in the form of cash?

A. The investment by Mr. Fazio was in the form of an inventory contribution. The other two by cash.

Q. And from what document are you reading from?

A. This is it. (The witness handed the paper to Mr. Dole.) I think that's the pencilled copy of the typed copy.

Q. And what do you call this from which you are reading? [101]

(Testimony of Robert H. Laborde, Jr.)

A. These are some notes of the summary of the partnership net worth transaction from the time they started business until September 30, 1952 when the corporation was formed.

Q. Did you prepare that summary, Mr. Laborde? A. Yes.

Mr. Dole: Can we mark that for identification please?

The Referee: Sure.

Mr. Dole: I don't think that's an exhibit.

Mr. Shapro: No, it's not an exhibit.

The Referee: Objector's No. 4 for identification.

(The paper referred to was received for identification by the Referee and marked "Objector's Exhibit No. 4 for Identification.")

Mr. Walsh: What is the date of that?

The Referee: It doesn't have a date.

Mr. Shapro: It's not dated.

The Witness: It runs from 1948 to September 30, 1952.

Q. Were there any subsequent contributions towards capital by any of the partners after the original contribution?

A. No, except for the one thing, of course, the inventory contribution by Mr. Fazio was done on two different times—one in very late '48 and one in very early '49.

Q. This figure which you have just given of thirty-nine thousand some odd dollars, does that include both the service shops? A. Yes. [102]

Q. So you consider those the total contributions.

A. Yes.

(Testimony of Robert H. Laborde, Jr.)

Q. Were you given instructions as to profit-sharing arrangements of the partners?

A. Yes.

Q. And what were your instructions?

A. Mr. Leonard was to receive a salary. The profit was to be split equally between the three after Leonard's salary.

Q. And from whom did you receive those instructions, if you recall?

A. I don't recall right now exactly.

Q. I know it was a long time ago. You say only Mr. Leonard was to receive a salary.

A. Yes.

Q. And was there a specific arrangement as to salary? Did it vary from time to time?

A. The amount varied over a period of time.

Q. Was there an arrangement with respect to a drawing account by any of the partners—a written drawing account?

A. Not that I recall. I never saw anything in writing and I never heard anyone discuss it orally as far as I know.

Q. In other words then, I gather that such drawings as there were were made for the partners and then you were informed of the amounts made for them so that you could record it in the partnership books.

A. Yes, that's right.

Q. Does this summary which you have in your hand reflect the drawings of each partner?

A. Yes.

Q. From the fiscal year then October '48 [103] to September 30, '49 there was a drawing only by the partner Leonard, is that correct?

(Testimony of Robert H. Laborde, Jr.)

A. Yes. That drawing is in excess of his salary.

Q. I see. And the same would be for the following fiscal year '49 to '50. A. Yes.

Q. Drawing there. And then in the fiscal year '50 to '51 there was a drawing then by all three partners but in varying amounts, is that correct?

A. Yes.

Q. As you have indicated it. Now, for the fiscal year '51 to '52 you have an item marked "transfers" I believe on that summary. Would you explain that to me, please?

A. Well, the transfers that took place there were two. There was a \$2,000 credit transferred from Mr. Fazio's account to Mr. Ambrose's account and then there was a \$3,060.11 credit for Mr. Fazio and a \$3,060.10 credit for Mr. Ambrose. Mr. Fazio was \$3,060.11 and Mr. Ambrose was \$3,060.10 which totals \$6,120.21 which was given to Mr. Leonard to his credit.

Q. Do you know what the basis of those transfers was?

A. Yes, they were personal notes executed by Mr. Leonard to each of the other two for those amounts.

Q. I see. The transfer is a plus figure for—Oh, no, I beg your pardon. In other words, both Mr. Fazio and Mr. Ambrose transferred to Mr. Leonard's account. A. Yes.

Q. So you have debited their accounts—rather, the accounts of Fazio and Ambrose are credited the account of Leonard. A. Yes. [104]

(Testimony of Robert H. Laborde, Jr.)

Q. And the fiscal year '51 to '52 there were cash withdrawals by all three partners, is that correct?

A. Yes.

Q. And those cash withdrawals totalled \$3,500.00 for Fazio, \$6,019.00 for Ambrose and \$5,468.00 for Leonard, is that correct? A. Yes.

Q. Now, that was the last year that the company existed as a partnership, isn't that correct?

A. That's correct.

Q. And in September of that year or October 1 of that year they incorporated. A. Right.

Q. And that also coincidentally I have indicated on the profit and loss statement, I believe, which is Mr. Fazio's Exhibit No. 2, that was the same year in which they lost \$22,000.00, is that correct?

A. Yes, the fiscal year ended September 30, 1952, they lost \$22,500.00.

Mr. Dole: Your Honor, could Objector's Exhibit No. 4 for Identification be introduced into the record?

The Referee: Do you have it, Mr. Laborde? Objector's No. 4 for Identification becomes No. 4 in evidence.

Q. Prior to the incorporation of Leonard Plumbing & Heating Supply Company, while they were still a partnership, were there any notes given to any of the individual partners by the partnership itself?

A. There was—very late September 1952 there were notes given by the partnership to Mr. Fazio and Mr. Ambrose. [105]

(Testimony of Robert H. Laborde, Jr.)

Mr. Dole: Are those in evidence? Do you have copies of those? I'm not sure whether they are or not.

Mr. Shapro: I'm not sure, either. Yes, the \$4,400.00 one of Fazio is. Mr. Ambrose, rather.

Mr. Dole: That's Objector's No. 5, is that correct?

Mr. Shapro: This is Plaintiff's No. 4.

Mr. Dole: That's in evidence.

Mr. Shapro: That's No. 4.

Q. Mr. Laborde, would you recognize either of those notes if I gave them to you now?

A. Yes, I think I would.

Q. I give you this document, I believe this is in evidence already, and ask if you recognize that?

A. Yes.

Q. And which note is that?

A. That is the note executed by the partnership to Mr. Ambrose.

Q. And the date of that note is September 15.

A. Yes.

Q. 1952. A. That's correct.

Q. That was some two weeks before the incorporation, is that correct? A. That's correct.

Q. What was the consideration given for that note, Mr. Laborde?

A. That is a—in other words, his capital account, I think at that time, would have been \$6,451.17 and this separated his capital account from—broke it up—Two Thousand capital and \$4,451.17 note payable. [106]

(Testimony of Robert H. Laborde, Jr.)

Q. May I see the note? Has he transferred any cash to the partnership for this note then?

A. Not at that time.

Q. Or at any time?

A. Well, he actually had more of an investment than Leonard who was the lowest member of the group so I mean it depends on how he looked at it. But at that particular time, he didn't put any money in.

Q. Now, referring to your summary of net worth, is that what you refer to—the way in which you refer to this Objector's No. 4?

A. Yes, that would be a summary of the partnership.

Q. Your figure here for Mr. Ambrose on 9-30-52, September 30, '52 indicates his capital account as having in it \$6,451.17. A. Yes.

Q. Actually that wouldn't be correct then, would it?

A. Well, broken down between—if you look right below that it was set up as Two Thousand capital for the ending balance sheet of the partnership; it was set up as Two Thousand capital and partners alone \$4,451.17.

Q. In other words, all he was doing was transferring the—his capital account into a debt account as evidenced by this note, is that correct?

A. Yes, that's correct.

Q. That's just an accounting procedure, just changing the nature of the amount of the capital obligation.

(Testimony of Robert H. Laborde, Jr.)

A. The accounting just reflects what they intended to do [107] at that time.

Q. I see. Now, I show you this note bearing the amount to Mr. Fazio and ask you if you recognize that? A. Yes.

Q. And that is in the amount of Forty-one Thousand—— A. 169.61.

Q. (Continuing): ——169.61, and again that's a similar transaction. A. Yes.

Q. Did you prepare either of these notes?

A. Mr. Fischer did as I recall it.

Q. Again, no cash was given in return as consideration for this note. A. Not at that time.

Q. All they did was deduct the amount in their capital accounts. A. Yes.

Q. And transfer it into a loan account or a debt account, is that correct? A. That's right.

Q. Did you ever have any discussions with either Mr. Fazio or Mr. Ambrose or as far as that goes with Mr. Leonard with reference to the creation of these notes?

A. I think I probably did at the time. I don't recall exactly.

Q. You don't recall what that discussion was?

A. I don't recall the exact terminology. I recall we were to break the things down between so much of an investment and so much for loan.

Q. Did you know at that time that the partnership intended to organize as a corporation?

A. Very definitely so.

Q. Did you have a discussion with either of the

(Testimony of Robert H. Laborde, Jr.)

three [108] partners with respect to the changing of the method of the accounting by transferring these sums from a capital account to a time account?

A. Well, the whole thing was done at one time. This transfer would bring Leonard up to a debit balance in his capital account and the setting up of a \$2,000.00 figure as capital and setting up the loans all done all at the same time more or less. It was all set up from the viewpoint that the business was going to be sold or transferred over to the corporation with the \$6,000.00 capital stock.

Q. Did you have discussions with the three partners with respect to that transaction?

A. You mean setting up the loan?

Q. Yes. A. Yes.

Q. And was that all done — that was all done then, as I understand your testimony, in connection with the prospective incorporation. A. Yes.

Q. Did they ever explain to you their reasons for doing it in this manner?

A. Well, we were the ones who decided the procedure and we discussed it with them.

Q. And what was your reason for doing it that way?

A. Well, the fact that the business was to be transferred to the corporation for the \$6,000.00 capital stock and the balance to be set up as a loan payable.

Q. Did you consider the fact that that very same year that [109] the corporation had lost \$22,000.00?

(Testimony of Robert H. Laborde, Jr.)

Did you discuss that fact with them and the effect it might have upon the financing of the business?

Mr. Crews: Just a second, I object to that question on the ground he is using the term corporation loosely and if he had placed it with the partnership, the partnership hasn't been—the corporation hasn't been formed yet.

(The last question was read by the Reporter.)

Mr. Dole: Partnership.

The Referee: Mr. Crews' comment is well taken. Would you have any objection to the question if partnership were substituted?

Mr. Crews: No.

A. The determination of exactly how much money they lost wasn't made until after September 30 so I didn't know it was Twenty-two Thousand until probably sometime in November—late October. But I did discuss the fact that it was losing money with Mr. Fazio.

Q. And do you remember the specific conversation that took place between you and the several partners with respect to that subject?

A. Oh, I can recall talking to Mr. Fazio over a period of time on numerous occasions about limits and he suggested that the business be incorporated.

Q. Did you originally suggest to them that the business be [110] incorporated?

A. Yes, I originally suggested to Mr. Fazio the business be incorporated.

Q. And when did you first make that suggestion to him?

(Testimony of Robert H. Laborde, Jr.)

A. About the fall, I would guess, somewhere about '51.

Q. What was your reason for making that suggestion?

A. Well, the business was primarily financed by Mr. Fazio's investment. Leonard was drawing the money out—I mean wasn't allowing anything to accumulate in the business. Mr. Fazio was active in the business. Mr. Ambrose was active in Mr. Fazio's business and only devoted part-time to Leonard's; it wasn't too good of a working relationship. The liabilities on the business as a partnership were pretty heavy. So I simply suggested that they incorporate.

Q. But what was the reason? Why did you think then that the corporation was necessary—desirable under those circumstances?

A. Well, it all depends on how you look at it. When I have a client who, for example, is in the high tax brackets as an individual, when a majority of the income that is made goes out for taxes, he is not active in the business, he doesn't have too much of a personal interest in the business, you have a lot of conditions that would call for having a corporation.

Q. Which of your clients was in the high tax bracket? A. Mr. Fazio.

Q. So it was in order to protect his personal interest that [111] you suggested the incorporation.

A. Yes.

(Testimony of Robert H. Laborde, Jr.)

Q. At the time you say you suggested this incorporation in the fall of 1952, is that correct?

A. Fall of '51.

Mr. Shapro: '51.

Q. And, of course, it was accomplished in the fall of '52. A. Yes.

Q. Would you have suggested it to Mr. Fazio had you realized that in the fiscal year '51-'52 the partnership was going to lose \$22,000.00?

A. If I'd have been able to look forward, that would have been that much more reason for having incorporated.

Q. You realized, of course, at this time that the individual partners were individually responsible for the debts. A. Yes.

Q. And you had that thought in mind.

A. That's correct.

Q. So then as revealed in the comparative balance sheet for the partnership through all those years until the date of the incorporation and the profit and loss statement, those are already in evidence, are they not?

Mr. Shapro: Yes, they are.

Mr. Dole: I believe they are. As Mr. Fazio's Exhibit No. 2, is that correct? Are both of them the same exhibit?

Mr. Shapro: Yes, the balance sheet and the P & L comparative, Claimant's No. 2. [112]

The Referee: Off the record, Mr. Dole.

(Discussion off the record.)

Mr. Dole: Now, that is the original note executed

(Testimony of Robert H. Laborde, Jr.)

September 15, 1952 by the partnership to Mr. Fazio—rather, it would be by the three partners individually to Mr. Fazio. I will introduce this in evidence now as trustee's or objector's exhibit next in order.

The Referee: No. 5.

(The document referred to was received in evidence by the Referee and marked "Objecting Trustee's Exhibit No. 5.")

Mr. Dole: Are the subsequent notes in evidence, Mr. Shapro?

Mr. Shapro: The subsequent note of Mr. Ambrose's is in evidence. The note of Mr. Fazio, the corporation note, the original is attached to his claim. It is in evidence as such.

(Discussion off the record.)

Q. Mr. Laborde, do you know whether at the time of the formation of the corporation, a dissolution of partnership was placed on file—a notice of dissolution of partnership?

A. No, I don't know.

Q. You don't know that at all. Do you know whether any such notice was given to creditors with respect to the change of the form of the business from partnership to corporation?

A. No, I don't. [113]

Q. Now, Mr. Laborde, referring now to Claimant Fazio's Exhibit No. 2 and the aspect that I am referring to is the comparative balance sheet—I think the same information would be on Trustee's Exhibit 3, the opening balance sheet—I notice that the September 30, 1952, that is the closing statement for the

(Testimony of Robert H. Laborde, Jr.)

partnership, you have two separate accounts here, one being notes payable and the other liabilities—loans from partners. Actually, that's a note payable account too, isn't it?

A. Would you mind repeating that question?

Q. Yes. You have two items. I'm referring to the liability side now of the balance sheet, notes payable \$59,000.00.

A. Oh, the notes payable \$59,000.00 to the American Trust.

Q. Oh, I see. When was that obligation first incurred?

A. Oh, they ran obligations to the American Trust all along for quite a long period of time.

Q. Was the \$59,000.00 evidenced by a single note?

A. No. It might be several things. That included a—let's see, there was a \$9,000.00 unsecured note and then \$50,000.00 against the accounts receivable.

Q. Oh, I see. When was the \$50,000.00 obligation originally incurred?

A. Oh, that was a running thing. They just went down and as they collected money on their accounts receivable, they gave them to the bank and if they sold merchandise they just went down and borrowed more money against it.

Q. So it was a fluctuating account. [114]

A. Fluctuating thing.

Q. You have it as a nice round figure for September 30, 1952, for \$59,000.00. A. Yes.

Q. Is that a note for \$59,000.00?

(Testimony of Robert H. Laborde, Jr.)

A. It would be several notes. That would have——

Q. You have told us already that there was a separate note for \$9,000.00 unsecured.

A. I don't recall whether they were signing actual notes financing against their accounts receivable or not but I presume they would have. Later they were. But it was run rather informally though with the American Trust.

(Discussion off the record.)

Mr. Walsh: Claim of the American Trust Company, claim No. 135 was filed June 29, 1955, \$20,-662.99 plus interest.

The Referee: Did it make any allusion with reference to the accounts receivable, did you notice?

Mr. Walsh: No.

The Referee: Did it just say unsecured claim?

Mr. Walsh: No, I have the claim file over in my office, but I remember it.

The Referee: You got that information from what—docket sheet?

Mr. Walsh: Docket, yes.

Q. At any rate, Mr. Laborde, on September 30, 1952 the last day of the partnership there was owing to American Trust Company [115] \$59,000.00.

A. That's correct.

Q. And those funds had been advanced to Leonard Plumbing & Heating Supply Company from time to time while it was a partnership.

A. Yes.

Q. Years preceding. At the time of the incorpo-

(Testimony of Robert H. Laborde, Jr.)

ration, was a new note executed to American Trust Company by the corporation?

A. I presume it was. I never did actually see it; I presume it was because the bank knew that it was being incorporated.

Q. I see. And you never saw that note at all.

A. No.

Q. You would also assume that it would be in the amount of \$59,000.00. A. Yes.

Q. Was that entire amount of \$59,000.00 paid back to the American Trust Company during the term of the corporation? A. Yes.

Q. The full \$59,000.00 was paid back.

A. Yes.

Q. May I see your accounts indicating payments to American Trust Company during the period of the corporation?

A. This is the only thing I have. It's dated September 30, 1953. "Notes renewed monthly" according to the notes of the CPA that did the examination.

Q. Do you have anything that indicates how much money was paid to the American Trust Company from October 1, 1952 to the time that the corporation discontinued business?

A. Oh, well, they were giving them practically all the cash that was coming in from sales so it would have been a pretty sizable figure but I mean, I don't have anything—— [116]

Mr. Shapro: Won't it——

A. (Continuing): No, that would be in the gen-

(Testimony of Robert H. Laborde, Jr.)

eral ledger. I would guess it would be several hundred thousand dollars over a period of time that would be paid in the following fiscal year.

Mr. Shapro: The general ledger—the one you had here the first time.

Mr. Walsh: Yes, I left it, do you remember?

Mr. Shapro: Yes, you did leave it but that isn't it.

Mr. Dole: No, it's a small one.

(Discussion off the record.)

Mr. Shapro: Maybe we can agree that whenever it's located it can go into evidence.

Mr. Dole: Yes.

(Discussion off the record.)

Q. Mr. Laborde, in other words, new notes were executed from time to time by the American Trust Company.

A. Well, they would pay against these notes and then go out and get more money against the receivables.

Q. And the American Trust Company at the time continued putting money into the corporation and the corporation continued——

A. That's right, they would pay on the old and borrow new. It was just a shuffle all the time.

Q. Mr. Laborde, I understand that the corporation actually came into existence October 1 for your purposes—accounting [117] purposes—1952.

A. Yes.

Q. And that an application was subsequently made to the Corporation Commissioner for a per-

(Testimony of Robert H. Laborde, Jr.)

mit to issue securities and the permit was received from the Corporation Commissioner. That's in evidence.

Mr. Shapro: It's Objector's No. 2.

Mr. Dole: That's Objector's No. 2 in evidence. May I see the permit please?

Mr. Shapro: Surely.

Q. This permit, of course, requires under Paragraph W that the stock be held in escrow. Was there an offer to sell the partnership assets to the corporation made prior to the actual incorporation of the business?

A. The corporation having been formed on September 22, I don't know just exactly legally how that would follow when you would be transferring from a partnership to a corporation.

Mr. Shapro: I submit, if your Honor please, that the record is the best evidence. The minute book shows when the offer was made and how.

The Referee: Very well. Sustained.

Q. And the corporation was organized on the basis of 600 shares of capital stock, I believe that was no par value, and valued at Ten Dollars a share. Was the contribution of each shareholder his \$2,000.00, is that correct?

A. Yes, that's their contribution.

Q. Actually, there was no transfer of cash to the corporation. [118] However, it was just a transfer of the assets and liabilities of the business in return for the stock, is that correct?

Mr. Shapro: I submit, if your Honor please, that

(Testimony of Robert H. Laborde, Jr.)

the question assumes a fact not in evidence and is incompetent, irrelevant and immaterial because the permit does not call for cash; the permit doesn't call for the issuance of stock against cash.

Mr. Dole: I am not making that point.

The Referee: You just ask it.

Mr. Dole: I just ask it.

The Referee: Overruled.

A. They just simply transferred the partnership assets and liabilities based on this statement.

The Referee: When you say this statement——

The Witness: This statement here which is Claimant's No. 2, Assets and Liabilities as of September 30, 1952.

Q. I see. May I see Claimant's No. 2 please—the original? Trustee's No. 3, is that available?

The Referee: They're all available.

Q. (Continuing): Actually, this Trustee's No. 3 that I show you, Mr. Laborde, represents a state of affairs as of the time you transferred to the corporation, does it not? A. Yes.

Q. Was this balance sheet prepared with an unqualified opinion or qualified opinion?

A. It was unqualified. [119]

Q. Unqualified opinion.

A. Yes, the balance sheet as of September 30, 1952 of the partnership which is the same as the opening of October 31, 1952.

Q. Under the provisions of Title XVI of the Administrative Code, Section 58, to express an unqualified opinion, Mr. Laborde, you are required to

(Testimony of Robert H. Laborde, Jr.)

acquire by the application of generally accepted accounting principles and procedures sufficient information to warrant such an opinion. Did you do that? A. Yes.

Q. Did you have an appraisal of the inventory?

A. You mean outside appraisal?

Q. Yes.

A. That is not customary under the rules that you have just quoted.

Q. Just answer yes or no. A. No.

Q. Did you or any member of your firm check the inventory? A. Yes.

Q. And which member of your firm did that?

A. The man that was actually there on October 2, 3, 4, and 5 was a CPA who is no longer with us by the name of Jim Arding.

Q. Did you instruct him with regards to checking and inspecting that inventory at all?

A. Personally, no.

Q. What were your instructions to him with regard to the inventory?

A. He was to—normally, he would know what to do. I [120] mean, he is well qualified. He went down and checked the inventory procedures, test-checked physical quantities. After the inventory was all complete, he would have test-checked the unit prices, test-checked extensions and checked totals.

Q. Do you and your firm give an unqualified opinion then that the amount of inventory indicated on this balance sheet is correct?

(Testimony of Robert H. Laborde, Jr.)

A. Yes, based on an examination as to the inventory, we could have. We did——

Q. And one member of your firm made that examination.

A. Normally we would do that in the case of where someone was incorporating we would have to give an unqualified opinion.

Q. Did you do it in this case? A. Yes.

Q. You say normally you would. But you gave no particular instructions to your accountant. What did you tell him with respect to preparation of this balance sheet?

A. No, I mean he is very well qualified as I say. I just went down and told him to check the inventory.

Q. And he returned to you. And what did he tell you? What information did he give you with respect to that inventory?

A. Well, of course, his papers are all written up. These happen to be his work sheet. He made notes as to the work he had done and so forth.

Q. Do you have those notes? A. Yes.

Q. May I see them please?

A. (The witness handed the papers to Mr. Dole.)

Q. Whose writing is this, Mr. Laborde?

A. That's Mr. Arding's.

Q. When did Mr. Arding prepare these notes?

A. I presume during the course of when he was making up the statements and everything and at the time he was making these various checks. In other words, he probably wrote those notes up a week or

(Testimony of Robert H. Laborde, Jr.)

so after; when he was all through working on the inventory he probably wrote them out.

Q. When did you first see these notes?

A. As such?

Q. Yes.

A. Oh, I don't recall exactly. I was just going through all the working papers again getting ready to come up here and that was one of the items I was looking over. Those would be typical, you know, from an examination of that type.

Q. I notice that on this balance sheet which is noted as Objector's No. 3, that there is no opinion stated, either qualified or unqualified. Is that merely an oversight?

A. That's correct. No, you asked—that was prepared—I prepared that just after we had that examination when we were down in the other building, oh, six or eight months ago. You asked for the opening entries for the corporation. That's how you happened to get that one. I can't seem to find their September 30 partnership with an unqualified statement on it. But if it was prepared with the audit, there has been any qualification as such, it would have been noted on the bottom of our [122]work sheet that this was prepared with audit, or the other one particularly, the one September 30, 1952 this happens to be just a memorandum of the September 30, 1952 statement. There is one that you have my work sheet on that Arding prepared, I think you had here a moment ago, which showed comparative profit and loss statement and so forth. I mean, that

(Testimony of Robert H. Laborde, Jr.)

was typed—it was typed without any notations at all so I presume that this was prepared with a complete check; otherwise, it would have to be prepared without an audit or some sort of a qualification.

Mr. Dole: I have no further questions of Mr. Laborde.

Redirect Examination

Q. (By Mr. Shapro): Mr. Laborde——

The Referee: Mr. Shapro, so there will be no misunderstanding between all of the counsel for the claimants and counsel for the trustee, is your examination now going to be on the basis of the redirect?

Mr. Shapro: Yes. At this point, I will lead it if I may to redirect. I'll try to confine myself to that subject matter.

Q. Mr. Laborde, you gave to counsel for the trustee your reasons that prompted your suggestion of the incorporation of Leonard's, to your knowledge was there any intention on the part of any of the three partners to avoid the payment of any of the partnership indebtedness by the corporation?

A. No.

Q. As a matter of fact, Mr. Laborde, all of the partnership [123] indebtedness was subsequent to October 1, 1952 paid by the corporation.

Mr. Walsh: Just a minute, if your Honor please, we will object to that as the accounts are the best evidence. How could he know all of that?

The Referee: Do you think you could answer Mr. Shapro's question?

The Witness: Yes.

(Testimony of Robert H. Laborde, Jr.)

The Referee: You know that they were all paid.

The Witness: With the exception of the notes to the two partners.

Q. To the two partners. Now, Mr. Laborde, is it correct to say that the September 30, 1952 balance sheet and profit and loss statement was made after audit? A. Yes.

Q. And the audit was made by your firm.

A. Yes.

Q. In connection with the inventory, how was the inventory priced in that audit?

A. It was priced by Mr. Leonard or one of his employees. I think he priced it principally.

Q. And it was at cost or market, whichever was lower.

A. Yes, that's what he was supposed to do.

Q. When you testified on direct examination here that there was verification by your office of inventory pricing and extensions, did that include to your knowledge the verification of pricing as between cost or market, whichever was lower?

A. Yes, we were to take the invoices that would be on file [124] of the people that shipped the merchandise and he took those to establish the unit prices.

Q. Is the employment of an independent or outside appraiser customary in connection with the making of an audited return on inventory?

A. No, sir, it's not customary.

Q. How long have you been a certified public accountant, Mr. Laborde? A. Since 1948.

(Testimony of Robert H. Laborde, Jr.)

Q. And how long prior to that were you engaged in public accounting practices?

A. Four years.

Q. And your experience then is with the firm of Brethauer & Fischer, subsequently Fischer & Laborde.

A. Yes. I had some experience prior to the war in New Orleans.

Q. In New Orleans?

A. It was another CPA.

Q. Mr. Laborde, referring your attention to Objector's No. 4—just answer this question, if you will, yes or no—do you know what was done with the withdrawals by Mr. Ambrose for the fiscal year October 1, 1950 to September 30, 1951?

A. No.

Q. Do you know what was done with the withdrawals by Mr. Ambrose for the year October '51 to September 30, 1952?

A. Yes.

Q. Will you tell the court what that was?

Mr. Dole: I'm going to object to that as incompetent, irrelevant and immaterial; it has no application to the [125] issue before the court.

Mr. Shapro: Your Honor, counsel interrogated the witness with respect to the exhibit, to which same exhibit I am referring, and this particular question on the basis of—he leaves the inference in the air that Mr. Ambrose withdrew \$6,000.00. I want to show what the witness says happened to the money.

The Referee: He may answer.

(Testimony of Robert H. Laborde, Jr.)

The Witness: Would you mind repeating the question?

(The last question was read by the Reporter.)

A. Yes, we computed that withdrawal for him as to—on March 1, 1952, we had to file a 1951 income tax return. Mr. Ambrose wanted to know how much he was paying as a result of the inclusion of the partnership income in this '51 income tax return. That amounted to \$5,446.08 and the reason why we computed it at that time was so that he could draw the money from Leonard Plumbing Company.

Q. To pay his income taxes?

A. To pay his income taxes. Now, there was a prior computation that was made for him at somewhere along the line which I never participated in, which would be a result of his income taxes for the year 1950. This computation relative to the 1951 income tax was paid in that \$6,019.08 I did participate in myself.

Q. Do you know, Mr. Laborde, what was done with the \$3,500.00 that was withdrawn by Mr. Fazio in the 1951-52 year?

A. That was— [126]

The Referee: Do you know?

The Witness: Yes.

Q. What was it?

A. It was the approximate amount I gave to him which his taxes were increased—personal income taxes were increased as a result of the inclusion of the Leonard Plumbing & Heating Company income in his individual tax return.

(Testimony of Robert H. Laborde, Jr.)

Q. And for what year was that individual income tax involved?

A. That would be the year 1950—yes, that would be the year 1950 because I never made any computation for the year '51 for him.

Mr. Shapro: No further redirect.

The Referee: Mr. Dole and Mr. Walsh, are you finished with Mr. Laborde, temporarily?

Mr. Dole: Objectors rest, your Honor.

The Referee: And that's the objector's case. Thank you, Mr. Laborde. The first witness for the claimants.

ROBERT H. LABORDE

called as a witness on behalf of the claimants, having been previously sworn by the Referee, testified as follows:

Direct Examination

Q. (By Mr. Shapro): Mr. Laborde, will you give to the Court at this time something of the nature of your experience in connection with businesses of this character—this character referring to that [127] of Leonard Plumbing & Heating and both as a partnership and as a corporation?

A. Well, you mean just what I did for the Leonard—

Q. No, what is your experience in connection with other businesses of similar character?

A. Well, this is the only plumbing supply house as such that I handled. I do have several other accounts that are in the hardware business and so on or trading businesses that are similar.

(Testimony of Robert H. Laborde.)

Q. And in connection with your work as a certified public accountant, have you from time to time been called upon to explain opinions as to the adequacy of working capital? A. Yes.

Q. And have you done so on numerous occasions? A. Yes.

Q. Were you similarly consulted by the Leonard group at or shortly prior to the incorporation of Leonard's? A. Yes.

Q. And on what did you—before I ask you what the opinion was—will you tell the Court upon what you based an opinion that you gave and which I am subsequently going to ask you to repeat here with respect to the adequacy of the working capital of this business immediately before and immediately subsequent to its incorporation?

Mr. Dole: Could I hear the question, please, your Honor? I'm going to object to that question as indefinite and confusing. I don't understand it.

The Referee: He is asking on what he based his opinion. That's all he is asking.

A. Well, by the conduct of the business and the knowledge actually participating with them and various things.

Q. In other words, your opinion was based upon your own knowledge of the business itself from its inception. A. Yes.

Q. And the contact that you had with that business was, as you described on direct examination when you were called by the trustee. A. Yes.

Q. Did you base your opinion on the same sub-

(Testimony of Robert H. Laborde.)

ject-matter that has been introduced in evidence here as Claimant's Exhibit No. 2 which is the comparative balance sheets and comparative profit and loss statements of the years of the partnership, the opening balance sheet of the corporation, which is Objector's No. 3, and the other records, papers and documents of the corporation which were available to and examined by you?

A. Yes, that would be part of it.

Q. Will you tell the Court now what the opinion was that you gave the corporation and if your present opinion on the subject differs, give your present opinion as well, referring to the time of the incorporation?

A. We offered to them—my offer was because I had more to do with the fact that they incorporated than anyone else, I think—was that \$6,000.00 would be set up as a capital stock and that would be the investment in the business. The rest of [129] it was set up as a note payable which would be liquidated more by—out of profits and that would be the way it would go.

Q. And did you express an opinion as to whether or not the stated capital of \$6,000.00, having in mind the execution of corporate notes for the remainder of what had been the capital accounts of the partners, would with the other assets of the business be sufficient in your opinion for the corporation to carry on successfully? A. Yes.

Q. Now, Mr. Laborde, did you give any consideration in reaching that opinion to the financial ar-

(Testimony of Robert H. Laborde.)

rangements between the American Trust Company, the partnership and the proposed corporation and the members of the partnership?

A. Yes, that would be part of it. You have to take the whole thing as a whole.

Q. Now, were you personally familiar with the arrangements between Messrs. Fazio and Ambrose and the American Trust with respect to Leonard's?

A. Yes.

Q. Will you tell the Court what those arrangements were both before the incorporation and after the incorporation?

A. The Leonard Plumbing as a partnership and as a corporation—the credit of the Leonard Plumbing with the American Trust Company was secured by a continuing guaranty which was signed by Mr. and Mrs. Fazio and Mr. and Mrs. Ambrose and Mr. and Mrs. Leonard in the amount of \$75,000.00.

Q. Now, having in mind that that was a continuing available amount of credit under the circumstances that you have outlined [130] is it your testimony that that contributed to and was an element of what you considered to be a proper basis for working capital?

A. Yes, very definitely so.

Q. Does Exhibit 4, Mr. Laborde—do you still have it—I note on Exhibit 4—that's Objector's Exhibit 4, Mr. Laborde, three notes denominated 1, 2 and 3 above. Will you explain to the Court what those mean?

(Testimony of Robert H. Laborde.)

A. The profit was shared equally after the allowance of the salary to Mr. Leonard and the reason why there are three different notes is that those are three different annual salaries.

Q. In other words, your notes 1, 2 and 3 indicate two things, first, that the amount of profit credited or loss charged to the capital account of each of the three partners was computed after allowing salary to Mr. Leonard in accordance with the oral understanding which you testified about this morning and also it shows the amount of salary, the varying amounts of salary allowed to Mr.—and withdrawals by Mr. Leonard during the periods covered by those three notes, is that right? A. Yes.

Q. And I think you testified, if not, do so now, that neither Fazio nor Ambrose at any time drew any salary as such from the business, either the partnership or the corporation.

A. That's correct.

Q. Mr. Leonard continued to draw and did draw, did he not, a salary from the corporation after its formation? A. Yes.

Q. Do you know how much that was? [131]

A. \$790.00 a month.

Mr. Shapro: No further questions.

The Referee: Any further questions from the claimant Ambrose with reference to Mr. Laborde's direct? It would make it much more simpler.

Q. (By Mr. Chew): Mr. Laborde, I notice that as of the date September 30, 1952 your books showed

(Testimony of Robert H. Laborde.)

a loan from the partnership in the amount of \$4451.17. Is that not right?

A. Yes, that's right.

Q. Since the date of the incorporation, Mr. Laborde, has there been any change in that amount?

Mr. Walsh: Amount. What do you mean, Mr. Chew?

Q. That \$4451.17 which was due and outstanding to Mr. Ambrose as of the date of the incorporation.

A. Yes.

Q. And will you tell me what exactly happened?

A. On December 31, 1952, Mr. Fazio transferred \$2,000.00 share of his note to Mr. Ambrose which would have increased that Forty-four Hundred and December 31, 1953 transferred another \$2,000.00 to that note account. Then there was some minor drawings made by Mr. Ambrose against the total amount of \$8400.00. I think there was an automobile for \$400.00 and then there were one or two small cash payments.

Q. And the transfers from Mr. Fazio's note to Mr. Ambrose's note was noted in the books of the corporation, was it not? [132] A. Yes.

Mr. Chew: That's all.

The Referee: Mr. Laborde, before counsel for the trustee takes on the examination, in answer to Mr. Shapro's question you stated in effect that the obligation due Mr. Ambrose and Mr. Fazio were going to be liquidated out of the profits of the corporation. Is that what you were saying?

The Witness: Well, that would be the under-

(Testimony of Robert H. Laborde.)

standing. In other words, as the company would go along, they would accumulate money and they would make payments against these notes.

The Referee: Well, then, the subject comes with reference to what the status would be if there was no profit.

The Witness: No——

The Referee: Forget bankruptcy.

The Witness: No, this is something that wasn't—that I had taken into account that they would pay these things as it went along. In other words, that there was no payment to be made in a week or something—as time went along they would receive money against their——

The Referee: Against their profits?

The Witness: Not directly as such against the profits. In other words, the profits would go to the business, you see, and then as the things went along they would pay [133] on the note.

Cross Examination

Q. (By Mr. Dole): If this concern, when it began a corporation, Mr. Laborde, had not paid the notes, given these notes to the two partners, Fazio and Ambrose, but had merely capitalized the same capital accounts of the partners and issued stock in like accounts or in like amounts, then any profits of the corporation would have been paid in the form of dividends, would they not?

A. There wouldn't have been any notes.

Q. That's right.

(Testimony of Robert H. Laborde.)

A. That would be the only way they could get their money out.

Q. And then that would be taxable. A. Yes.

Q. At the time you assisted these people in converting to a corporation and advised them to transfer the funds from these capital accounts into loans from the corporation to the partners did you advise them that in the event the corporation failed that their claims might be subordinated to those of other general creditors?

A. No, there never was any discussion on that.

Q. And you never undertook to advise them of that fact. A. (Witness nods negatively.)

Mr. Dole: I have no other questions.

The Referee: Mr. Shapro?

Mr. Shapro: No other questions.

The Referee: Is Mr. Laborde excused? [134]

Mr. Shapro: Yes.

The Referee: Thanks very much, Mr. Laborde.

Mr. Shapro: As far as the claimant Fazio is concerned, your Honor, we rest.

Mr. Chew: At this time, your Honor, I would like to make a motion to amend Mr. Ambrose's claim to conform with the proof as has been presented and——

The Referee: Do you know offhand what the change would be in figures?

Mr. Chew: No change in the figures, your Honor. It's just the statement of the consideration.

The Referee: No change in the figures.

Mr. Chew: No change in the figures. The orig-

inal note has been admitted into evidence so that we won't have to identify it at least.

The Referee: You have no objection.

Mr. Dole: No objection.

Mr. Walsh: No objection.

The Referee: The motion is granted.

Mr. Chew: The claimant Ambrose rests also.

The Referee: What is the desire of the objector and the claimant with reference to this matter on the submission?

Mr. Walsh: It stands submitted now except for submission of briefs.

Mr. Shapro: And that one exhibit you are going to [135] present.

Mr. Walsh: Yes.

The Referee: And it's stipulated that that exhibit be a part of the record.

Mr. Dole: It may.

The Referee: And the exhibit, as I understand, is the ledger sheet.

Mr. Walsh: We will introduce the entire ledger in evidence.

Mr. Dole: As far as that goes, I would not have introduced it now. Did you wish it to be introduced?

Mr. Shapro: No.

Mr. Dole: Then it doesn't have to——

Mr. Shapro: Then we'll forget about it. That's fine.

The Referee: Now, Mr. Walsh and Mr. Dole, how much time do you desire?

Mr. Dole: Thirty days.

The Referee: The claimant Ambrose and the claimant Fazio's time will start to run at the same time. In other words, when the trustee files his memorandum within thirty days, then each of the claimants will have thirty days to answer in—thirty and thirty. In other words, they will each reply.

Mr. Shapro: In other words, our thirties will run simultaneously. [136]

The Referee: That's right.

Mr. Shapro: But after the submission of the trustee's brief.

Mr. Crews: Sixty altogether.

Mr. Walsh: And fifteen days for reply.

Mr. Shapro: We haven't gotten that far.

The Referee: How much time do you want?

Mr. Dole: Fifteen will be adequate.

The Referee: Let the record show that the Court is retaining all of the exhibits.

[Endorsed]: Filed Sept. 18, 1956.

[Endorsed]: No. 15587. United States Court of Appeals For The Ninth Circuit. John Costello, Trustee in Bankruptcy of Leonard Plumbing and Heating Supply, Inc., bankrupt, Appellant, vs. J. A. Fazio and Lawrence C. Ambrose, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: June 10, 1957.

Docketed: June 18, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15587

JOHN COSTELLO, Trustee of the Estate of
LEONARD PLUMBING & HEATING SUP-
PLY, INC., a California corporation, bankrupt,
Appellant,

vs.

J. A. FAZIO and L. C. AMBROSE,
Appellees.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Pursuant to the rules of this Court, appellant

John Costello, trustee of the estate of Leonard Plumbing & Heating Supply, Inc., a California corporation, bankrupt, makes this statement of points on which he intends to rely in this appeal.

1. The District Court erred in affirming the order of the Referee in Bankruptcy overruling the Trustee's objections to the proofs of the claims of J. A. Fazio and L. C. Ambrose (Lawrence C. Ambrose).

2. The District Court erred in holding that there is substantial evidence in the record to sustain the findings of the Referee in Bankruptcy. In particular the District Court erred in holding that the first, fourth, fifth, sixth, seventh, ninth, tenth and eleventh findings contained therein are supported by the evidence.

3. The District Court erred in not finding that the proofs of the claims of J. A. Fazio and L. C. Ambrose (Lawrence C. Ambrose) if allowed at all, should be subordinated to those of other unsecured creditors.

4. The District Court erred in not finding that the obligations upon which the claims of J. A. Fazio and L. C. Ambrose (Lawrence C. Ambrose) were founded were conditional obligations to pay a debt out of an uncertain fund, which fund never came into existence.

5. The District Court erred in denying the relief prayed for in the Trustee's Objections to the Proofs

of Claims filed by J. A. Fazio and Lawrence C. Ambrose (L. C. Ambrose) herein.

Dated: June 24, 1957.

FRANCIS P. WALSH,
HENRY GROSS,
JAMES M. CONNERS,
STUART R. DOLE,

/s/ By FRANCIS P. WALSH,
Attorneys for Appellant John Costello, Trustee of
the Estate of Leonard Plumbing & Heating
Supply, Inc., a California corporation, Bank-
rupt.

[Title of Court of Appeals and Cause.]

DESIGNATION OF ALL OF THE RECORD
WHICH IS MATERIAL TO THE CONSID-
ERATION OF THE APPEAL

Comes now John Costello, Trustee of the estate of Leonard Plumbing & Heating Supply, Inc., a California corporation, bankrupt, appellant in the above entitled cause, and states that the parts of the record as docketed in the above court deemed necessary to the consideration of the appeal herein are as follows:

1. The entire transcript of the record, proceedings and evidence set out in the Referee's Certificate on Petition for Review of Order Overruling Trustee's Objections to Proofs of Claim of J. A. Fazio and Lawrence C. Ambrose (L. C. Ambrose),

said certificate being dated the 6th day of February 1957, and filed with the District Court on the 7th day of February, 1957.

2. The original documents transmitted with the Certificate on Review.

3. The order of the District Court dated April 11, 1957, affirming said Referee's order; and Notice of Appeal.

4. This designation.

Dated: June 24, 1957.

FRANCIS P. WALSH,
HENRY GROSS,
JAMES M. CONNERS,
STUART R. DOLE,

/s/ By FRANCIS P. WALSH,
Attorneys for Appellant John Costello, Trustee of
the Estate of Leonard Plumbing & Heating
Supply, Inc., a California corporation, bank-
rupt.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 25, 1957. Paul P.
O'Brien, Clerk.

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No. 15,590

United States Court of Appeals
For the Ninth Circuit

In the Matter of the Application of
WILLIAM J. McNALLY,
Petitioner, for a Writ of Habeas
Corpus.

APPELLEE'S BRIEF.

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
600 State Building, San Francisco 2, California,
Attorneys for Appellee.

FILED
3-1-58



Subject Index

	Page
Statement of the case	1
Statement of the facts	2
Appellant's contentions	5
Summary of appellant's argument	6
Argument	6

I.

The appeal is moot; petitioner is no longer imprisoned in the Los Angeles county jail and is no longer in the custody of the Los Angeles county sheriff	6
---	---

II.

Petitioner has not exhausted his state remedies within the meaning of 28 USC 2254	8
---	---

III.

The allegations of the petitioner are insufficient to state a cause for relief	12
Conclusion	14

Table of Authorities Cited

Cases	Pages
Brown v. Allen, 344 U.S. 443	10
Buchanan v. O'Brien, 181 Fed. 2d 601 (1st Cir., 1950)	12
Collins v. McDonald, 258 U.S. 416	14
Cuddy, petitioner, 131 U.S. 280	14
Dickson v. Castle, 244 Fed. 2d 665 (9th Cir., 1957)	8
Diggs v. Welch, 148 F. 2d 667, cert. den. 325 U.S. 889 (D.C. C.A. 1945)	10
Elliott v. Hendricks, 213 F. 2d 922	7
Ex parte Haumesch, 82 F. 2d 558 (9th Cir. 1936)	10
Factor v. Fox, 175 Fed. 2d 626 (6th Cir. 1949)	7
Goto v. Lane, 265 U.S. 393	8
In re Dixon, 41 Cal. 2d 756	8
In re McNally, 46 A.C. 306	2
In re Razutis, 35 Cal. 2d 532	11, 12
In re Swain, 34 Cal. 2d 300	11
Kohl v. Lehlback, 160 U.S. 293	14
Langer v. Ragen, 237 F. 2d 827, 7th Cir. 1956	14
People v. Cato, 136 Cal. App. 2d 503	9
People v. Dawson, 98 Cal. App. 2d 517	9
People v. Hartridge, 134 C.A. 2d 659	10
People v. Slobodian, 30 Cal. 2d 362	9
Pollard v. United States, 352 U.S. 354 (1957)	7, 8
Price v. Johnson, 334 U.S. 266	14
Sunal v. Large, 332 U.S. 174	8
United States ex rel. Calvin v. Cloudy, 95 Fed. Supp. 732 (D.C. N. 1951)	12
Willis v. Utecht, 185 Fed. 2d 810 (8th Cir. 1950)	12

Codes

Penal Code, Section 995	3
28 U.S.C. 2254	6, 8

No. 15,590

**United States Court of Appeals
For the Ninth Circuit**

In the Matter of the Application of
WILLIAM J. McNALLY,
Petitioner, for a Writ of Habeas
Corpus.

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

On February 14, 1957, McNally filed a petition for writ of habeas corpus in the United States District Court for the Southern District of California, Central Division. (Cl. Tr. 4-32.) On February 15, 1957, the Honorable Leon R. Yankwich, judge of the United States District Court, denied the petition. (Cl. Tr. 33.)

The notice of appeal was filed on February 25, 1957. (Cl. Tr. 43.) On March 1, 1957, petitioner filed in this Court an application for a certificate of probable cause. The certificate of probable cause was granted by Judge Hamlin on March 11, 1957.

STATEMENT OF THE FACTS.

The petition for writ of habeas corpus filed in the United States District Court alleges that the petitioner was denied due process of law. He alleges that the district attorney knowingly used perjured testimony, that petitioner did not have the effective assistance of counsel, and that he was unconstitutionally denied his appeal in the State Court. He likewise alleges numerous other errors in instructions and misconduct on the part of the prosecutor and the judge.

Petitioner was convicted on October 15, 1953, in the Superior Court of the State of California, in and for the County of Los Angeles, of the crime of Grand Theft in action number 156,252 on the files of that Court. Petitioner did not file a timely notice of appeal from that judgment. Petitioner has filed several proceedings in the California State Courts, among them a petition for writ of habeas corpus in the California Supreme Court, Criminal No. 5783 on the records of that Court. Petitioner likewise filed a petition for writ of habeas corpus in the California Supreme Court, No. 5884 on the files of the Clerk of the California Supreme Court. The California Supreme Court denied both of these applications. The California Supreme Court rendered an opinion in action No. 5783 which is reported as *In re McNally*, 46 A.C. 306. In this proceeding the petitioner was represented by counsel. The California Supreme Court denied the application for writ of habeas corpus in action No. 5884 on April 18, 1956. At the time these applications were made in the California Su-

preme Court the following documents were lodged with the Court: 1. The Los Angeles Superior Court files in the case of *People v. McNally*, No. 156,252 in the files of said Superior Court 2. The clerk's transcript in *People v. McNally*, 2 Crim. No. 5357. [The opinion of the District Court of Appeal in that matter is reported in 134 Cal. App. 2d 410.] 3. The reporter's transcript in *People v. Madlung*, 2 Crim. 5142 in the files of the District Court of Appeal, Second District of the State of California, which was Los Angeles Superior Court No. 156,968—[this case was consolidated for trial with the case of *People v. McNally*, Los Angeles Superior Court No. 156,252.]

The files and records which were lodged with the California Supreme Court with those applications reveal the following facts:

On May 21, 1953, the petitioner appeared in Court with his counsel, was arraigned on an information charging grand theft and robbery and made a motion under Section 995 of the Penal Code. (Cl. Tr. p. 4, *People v. McNally*, 2 Crim. 5357.)

On June 8, 1953, the motion was denied and petitioner entered a plea of "Not Guilty". (Cl. Tr. p. 5.)

On August 24, 1953, petitioner, with his counsel, was present in Court for trial and by stipulation of counsel, the matter was consolidated for trial with the case of *People v. Madlung*, Los Angeles Superior Court No. 156,968. (Cl. Tr. p. 6.)

At this time, on motion of the district attorney, the allegation of the prior conviction of McNally of the

crime of burglary was stricken from the record and the district attorney further agreed not to use McNally's prior felony conviction for impeachment in cross-examination. The proceedings at this time are set forth in the reporter's transcript in *People v. Madlung*, 2 Crim. 5142, p. 2, line 3 to p. 3, line 21. (See also Cl. Tr. p. 6, *People v. McNally*, 2 Crim. 5357.)

Following a trial by jury, during which at all times the petitioner was represented by counsel (see Rep. Tr. pp. 2-265, *People v. Madlung*, 2 Crim. 5142), verdicts were returned finding petitioner and his co-defendant guilty of grand theft as charged in count 1, and not guilty of robbery as charged in count 2. (Cl. Tr. pp. 7-10, *People v. McNally*, 2 Crim. 5357.) The verdicts were filed August 29, 1953.

Petitioner, through counsel, moved for a new trial which was denied on October 15, 1953, as was his application for probation, and on that date judgment was pronounced and petitioner was sentenced to the State Prison for the term prescribed by law. (Cl. Tr. pp. 11-12, *People v. McNally*, 2 Crim. 5357.)

He was represented by counsel at the time judgment was pronounced. The proceedings at that time are found in the file of *People v. McNally*, Los Angeles Superior Court No. 156,252.

The petitioner at no time prior to the return of the verdict of guilt expressed a desire to discharge his attorney. Following the verdict, and by a letter bearing a date of September 3, 1953 (see file in *People v. McNally*, Los Angeles Superior Court No. 156,252) he

complained that he was "not adequately defended for there was no defense offered. . . ." He also wrote a letter dated September 15, 1953 (see file, *People v. McNally*, Los Angeles Superior Court No. 156,252). These letters preceded the hearing on the motion for new trial and the application for probation.

On October 15, 1953, the defendant, being in open Court with his counsel, expressed no dissatisfaction with his counsel and he did not purport to discharge him. The trial judge made inquiry as to the complaints expressed regarding the representation but the petitioner made no objection to the trial counsel representing him at the hearing on the motion for new trial or on the arraignment for judgment.

APPELLANT'S CONTENTIONS.

I. The petition stated sufficient facts to require a response and the taking of evidence by the District Court.

II. All of the facts stated in the petition and the argument must be considered as true for the purpose of determining if the petition is sufficient.

III. Substantial federal questions were raised by the petition:

A. The petition sufficiently pleaded the denial of the right of effective representation of counsel in violation of due process of law.

B. The petition sufficiently pleaded the knowing use by the prosecution of perjured testimony in violation of due process of law.

C. The petition sufficiently pleaded the denial by the state authorities of petitioner's right to appeal under California law in violation of due process of law.

IV. No other District Court has passed on the questions presented by the instant petition for writ of habeas corpus.

SUMMARY OF APPELLANT'S ARGUMENT.

I. The appeal is moot; petitioner is no longer imprisoned in the Los Angeles County jail and is no longer in the custody of the Los Angeles County sheriff.

II. Petitioner has not exhausted his state remedies within the meaning of 28 U.S.C. 2254.

III. The allegations of the petition are insufficient to state a cause for relief.

ARGUMENT.

I.

THE APPEAL IS MOOT; PETITIONER IS NO LONGER IMPRISONED IN THE LOS ANGELES COUNTY JAIL AND IS NO LONGER IN THE CUSTODY OF THE LOS ANGELES COUNTY SHERIFF.

The petition reflects the fact that petitioner at the time of the filing of the petition in the United States District Court, Southern District of California, Central Division, was confined in the Los Angeles County jail. While so incarcerated he was in the custody and

control of the Los Angeles County sheriff. Since the denial of the petition for writ of habeas corpus petitioner has been transferred to the California State Prison at San Quentin. He is currently in the custody of Warden Dickson of the San Quentin Prison. It thus appears that the present appeal is moot under all the tests used to determine mootness.

This case is moot under the test laid down in the case of *Factor v. Fox*, 175 Fed. 2d 626, (6th Cir. 1949), and similar cases. Under that test an appeal is moot whenever there is no one present within the district responsible for the petitioner's detention who would be an appropriate respondent. There is no longer an appropriate respondent in the Southern District of California, Central Division. Any order the Court made to the sheriff for the production of the petitioner would be a useless order. The sheriff of Los Angeles County no longer has the custody of the petitioner and could not comply with any order of the District Court requiring him to produce the petitioner for a hearing. Indeed, furthermore, the sheriff of Los Angeles County could not require the warden of San Quentin State Prison to produce the prisoner in Los Angeles County. The District Court of the Southern District of California, Central Division, has no jurisdiction over Warden Dickson of the California State Prison at San Quentin. Of course, the jurisdiction of the Court in habeas corpus extends only over the person who has control of the petitioner and not over the State. See *Elliott v. Hendricks*, 213 F. 2d 922.

Furthermore, the appeal is moot under the test of *Pollard v. United States*, 352 U.S. 354 (1957), and

Dickson v. Castle, 244 Fed. 2d 665 (9th Cir., 1957). Under the *Pollard* decision an appeal is not moot where "the possibility of consequences collateral" to the judgment is "sufficiently substantial" to justify the Court in dealing with the merits. The denial of this petition for writ of habeas corpus would have no material effect if this Court found the appeal to be moot. In those circumstances the denial of the writ of habeas corpus would not be a sufficient basis for the future denial of the writ of habeas corpus.

As demonstrated above, it is clear that the reversal of the order of denial would have no material effect, since the District Court would be without jurisdiction to compel a hearing on the issues presented by the petition for writ of habeas corpus.

II.

PETITIONER HAS NOT EXHAUSTED HIS STATE REMEDIES WITHIN THE MEANING OF 28 USC 2254.

Petitioner has not exhausted his state remedies. Neither under California law nor under federal law may a petitioner use a writ of habeas corpus as a substitute for an appeal. See *In re Dixon*, 41 Cal. 2d 756; *Sunal v. Large*, 332 U.S. 174; *Goto v. Lane*, 265 U.S. 393. If petitioner had properly pursued his appeal as allowed by California law he could have presented the questions concerning the consolidations of trial, misconduct in instructions, ineffective assistance of counsel, the misconduct of the trial Court and prosecution

and the many other questions raised in the present petition. (Had a timely notice of appeal been filed petitioner would have been entitled to a free copy of the transcript of the proceedings in the criminal trial and would have been entitled to pursue his appeal.)

Petitioner alleges that he was unconstitutionally denied his right to appeal in California. Petitioner raised this objection in the proceedings in the State Court. In the California Supreme Court (Criminal No. 5783) petitioner did not allege that any prison official neglected or intentionally acted to prevent petitioner from filing a timely notice of appeal. Petitioner did not adequately plead a constructive filing of notice of appeal and was not entitled to a transcript of the proceedings under California law. Where the failure to file a timely notice of appeal is due to the fault or neglect of state officials the notice is deemed constructively filed. See *People v. Slobodian*, 30 Cal. 2d 362; *People v. Cato*, 136 Cal. App. 2d 503. However, the mere failure of an attorney to comply with the request of a defendant to file a notice of appeal has been repeatedly held insufficient cause for deeming the notice of appeal to be constructively filed. *People v. Dawson*, 98 Cal. App. 2d 517. Thus, it is apparent under California law that petitioner did not adequately allege a constructive filing of a notice of appeal since he failed to allege that any state official prevented the filing of a timely notice of appeal.

The determination of the California Supreme Court on this question as to whether or not petitioner suf-

ficiently alleged a constructive filing of notice of appeal is conclusive.

Petitioner's counsel seek to characterize the allegation concerning *ineffective assistance of counsel* as the equivalent of the *denial of counsel*. This analogy is not accurate. Before "ineffective counsel" results in a denial of due process counsel's conduct of the defense must be of such a low caliber that it reduces the trial to a sham and a farce. It is the theory of the "ineffective counsel" cases that the conduct of the defense counsel in the presence of the Court must be of such a low caliber that the judge is given notice of the ineffective representation and his failure to intercede constitutes state action which results in denial of the due process. Compare *Diggs v. Welch*, 148 F. 2d 667, cert. den. 325 U.S. 889 (D.C. C.A. 1945); *Ex parte Haumesch*, 82 F. 2d 558 (9th Cir. 1936).

It is obvious that such a contention could and should be raised on appeal. See *People v. Hartridge*, 134 C.A. 2d 659. The failure to properly take an appeal and raise the matters of ineffective counsel on appeal constituted failure to exhaust state remedies. This contention has been waived. Indeed, as said in the case of *Brown v. Allen*, 344 U.S. 443 at 503, rights under the federal constitution may be waived at the trial and by failure to assert such errors on appeal. The opinion in *Brown v. Allen*, *supra*, at 503 states the rule as follows:

"Of course, nothing we have said suggests that the federal habeas corpus jurisdiction can displace

a state's procedural rule requiring that certain errors be raised on appeal. Normally, rights under the federal constitution may be waived at the trial (citation) and may likewise be waived by failure to assert such error on appeal. (Citation.) When a state insists that a defendant be held to his choice of trial strategy and not be allowed to try a different tack on state habeas corpus he may be deemed to have waived his claim and thus has not right to assert on federal habeas corpus. Such considerations of orderly appellate procedure give rise to the conventional statement that habeas corpus should not do service for an appeal."

Furthermore, petitioner has not exhausted his state remedies, because he has not complied with the California Supreme Court procedural requirements. The California Supreme Court procedural requirements require that all matters be set up at the earliest opportunity. To avoid operation of this rule a petitioner attacking a judgment collaterally must indicate that he had no opportunity at the trial to present the matters alleged. See *In re Razutis*, 35 Cal. 2d 532, 536; *In re Swain*, 34 Cal. 2d 300. It will be noted that the petition, No. 5884 in the California Supreme Court, was filed *two and one-half years after the judgment*; the matters raised in that petition were not raised prior to that date. Thus, petitioner was required to explain the delay and did not do so. Under these circumstances the California Supreme Court may properly deny the petition until petitioner have given an honest and frank explanation of this fact.

Furthermore, petitioner did not adequately plead the facts upon which he relies in the petition filed in the California Supreme Court. See *In re Razutis*, 35 Cal. 2d 532. Petitioner did not allege specifically who connected with the prosecution knew of the alleged perjured testimony. However, the petition filed in the District Court, in the portion labeled "Argument", states that a particular deputy district attorney knowingly and willingly used perjured testimony. Such allegation was not, however, contained in the petition filed in the California Supreme Court.

Until appellant has submitted a petition that conforms to the State procedural requirements, he has not exhausted his state remedies. No exceptional circumstances are alleged to obviate the necessity for exhaustion of state remedies. The petition was, therefore, properly dismissed.

Indeed, it is well settled that there can be no exhaustion of state remedies until there has been submitted a petition that conforms to state procedural requirements. *Buchanan v. O'Brien*, 181 Fed. 2d 601 (1st Cir., 1950); *Willis v. Utecht*, 185 Fed. 2d 810 (8th Cir. 1950; *United States ex rel. Calvin v. Cloudy*, 95 Fed. Supp. 732 (D.C. N. 1951).

III.

THE ALLEGATIONS OF THE PETITION ARE INSUFFICIENT TO STATE A CAUSE FOR RELIEF.

The District Court properly denied the petition since the allegations were too general to state a cause

for relief. The only references in the petition proper were of a general form. Petitioner alleged generally that during the course of the trial a fraud was perpetrated on the petitioner by the district attorney, perjured testimony was knowingly used by the district attorney, and "petitioner was denied counsel of his own choice and judgment was rendered without ruling on petitioner's motion for a new trial, at this hearing petitioner had a mere token or *pro forma* appearance of counsel" and "there was a significant lack of competent and capable counsel to protect petitioner's substantial rights".

These allegations are in general form as are all of the other allegations in the petition. Petitioner has failed to state sufficient facts to state a cause for relief. A petitioner is required to state the facts upon which he relies as a basis for relief on habeas corpus. He may not rely on a conclusion of law. This universal rule does not require of the petitioner any compliance with legal technicalities. All such rule requires is an honest and frank statement of the facts upon which he relies. The petition filed in the instant case is typical of the problems created by permitting the pleading of conclusions in habeas corpus petitions. Only the bare conclusion is stated and it is intermixed with much pseudo-legal argument which serves only to confuse and compound the issue. The Court should insist that petitioners frankly state the facts upon which they rely as a basis for relief in a habeas corpus petition. The Court should state that the legal arguments upon which petitioner relies are secondary to an honest statement of the facts.

The proposition that an allegation of law unsupported by any specific fact is insufficient to state a cause for relief is supported by many cases. See *Collins v. McDonald*, 258 U.S. 416, 420-421; *Kohl v. Lehlback*, 160 U.S. 293, 299; *Cuddy, petitioner*, 131 U.S. 280, 286. Also see, *Langer v. Ragen*, 237 F. 2d 827, 7th Cir. 1956; and compare *Price v. Johnson*, 334 U.S. 266, 286-287.

It should be noted that the case of *Price v. Johnson*, *supra*, although frequently referred to as supporting the proposition that a pleading of a conclusion is sufficient in a habeas corpus case, does not so hold.

Petitioner cannot rely upon the facts intermixed in his legal argument as the basis for his petition.

CONCLUSION.

It is respectfully submitted that the appeal be dismissed and/or the order of denial affirmed.

Dated, San Francisco, California,

October 8, 1957.

EDMUND G. BROWN,

Attorney General of the State of California,

CLARENCE A. LINN,

Assistant Attorney General of the State of California,

ARLO E. SMITH,

Deputy Attorney General of the State of California,

Attorneys for Appellee.

United States
COURT OF APPEALS
for the Ninth Circuit

GLEN TITUS,

Appellant,

vs.

MADAM CADIO G. SIGALAS, et al., owners and
PACIFIC ATLANTIC STEAMSHIP COM-
PANY, Charterer of the SS Santorini, etc.

Appellees.

BRIEF OF APPELLANT

*Appeal from the United States District Court for the
District of Oregon.*

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FILED

OCT - 1 1957

PAUL C. GORDEN

INDEX

	Page
Jurisdiction	1
Statement of the Case	2
Specification of Errors	2
Argument	4
I. Claimant's vessel was unseaworthy because it contained an appliance inadequate for its intended use, namely a preventer wire which broke during usual and properly conducted loading operations	4
II. Appellant's general damages for his fractured right ankle and resulting permanent impairment of his ability to work, permanent pain, and discolored skin, should be assessed at \$15,000.00 ...	14
Conclusion	15

TABLE OF CASES

	Page
Alaska S. S. Co. v. Petterson, 347 U.S. 396, 98 L. Ed. 798, 74 S. Ct. 601 (1954), affirming CA 9, 205 F. 2d 478	11, 12
Caudill v. Victory Carriers, Inc., D. C. Va. 1957 AMC 772	12
Grillea v. U. S., CA 2, 232 F2d 919	9
Mahnich v. Southern S. S. Co., 321 U.S. 96, 88 L. Ed. 561, 64 S. Ct. 455	10
Pope & Talbot v. Hawn, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953)	12
Reynolds v. Royal Mail Lines, Ltd., D. C. Cal., 147 F. S. 223 (1956)	9
Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099	11
The Osceola, 189 U.S. 158	11
Weil and Amundsen v. Potter, CA 9, 228 F2d 341	12

STATUTES

Title 28, USCA, sec. 1333	1
Title USCA, sec. 1291	1

United States
COURT OF APPEALS
for the Ninth Circuit

GLEN TITUS,

Appellant,

vs.

MADAM CADIO G. SIGALAS, et al., owners and
PACIFIC ATLANTIC STEAMSHIP COM-
PANY, Charterer of the SS Santorini, etc.

Appellees.

BRIEF OF APPELLANT

*Appeal from the United States District Court for the
District of Oregon.*

JURISDICTION

The jurisdiction of the District Court was based upon this being a suit in Admiralty. Title 28 USCA. sec. 1333.

The jurisdiction of this Court is based upon this being an appeal from the decree entered in that suit. Title USCA, sec. 1291.

Reference is made to the Libel (R. 3), the Answer (R. 8) and the Pre-trial Order (R. 11).

STATEMENT OF THE CASE

Appellant, a longshoreman, was injuring while attempting to escape a swinging cargo boom which broke loose during loading operations on appellee's vessel when a preventer line and a guy line snapped. Appellant contends that the vessel was unseaworthy in that the preventer line was inadequate for the purpose for which it was intended to be used, and because the vessel had only one, instead of two, cleats with which to secure the preventer to the bull rail.

The cause was tried to the Court alone and immediately thereafter the Court rendered an oral opinion in favor of appellant and against appellees. Later the Court withdrew its opinion and took the case under advisement in an Order dated February 6, 1956 (R. 19). Nearly a year later, the Court filed an Opinion dated January 8, 1957, finding in favor of claimants (R. 27), and pursuant thereto Findings of Fact and Conclusions of Law were made and entered on March 4, 1957 (R. 40). A Decree for claimants was also entered at that time and libellant duly filed his Notice of Appeal (R. 47).

SPECIFICATION OF ERRORS

I.

The Court erred in finding the appellee's vessel seaworthy, and more particularly in making the following Findings of Fact and Conclusions of Law:

1. Finding of Fact No. VI (R. 42), because under the evidence the preventer wire was not without defect and was not of proper size and strength for the work for which it was being used.

2. Finding of Fact No. IX (R. 43), because there is no evidence that the angle of the preventer at the pad eye did not cause or contribute to the breaking. On the contrary, the evidence shows that the lack of a second cleat made it necessary to rig the preventer in such a way that an excessive strain was placed upon it at and near the pad eye.

3. Finding of Fact No. XI (R. 43), because the preventer wire was unseaworthy and defective.

4. Finding of Fact No. XII (R. 43), insofar as this Finding implies that an unusual or excessive force was exerted on the preventer by the longshoremen immediately prior to the breaking.

5. Finding of Fact No. XIII (R. 43), in its entirety.

6. Conclusions of Law Nos. II through V, in that they are contrary to the law and evidence.

II.

The Court erred in fixing appellant's general damages in the amount of \$5,000.00, which sum is grossly inadequate. Appellant respectfully moves this Court for an award of \$15,000.00 general damages should it decide he is entitled to recover. Finding of Fact No. XIV (R. 44).

ARGUMENT

I.

**CLAIMANTS' VESSEL WAS UNSEAWORTHY BECAUSE IT
CONTAINED AN APPLIANCE INADEQUATE FOR ITS IN-
TENDED USE, NAMELY A PREVENTER WIRE WHICH BROKE
DURING USUAL AND PROPERLY CONDUCTED
LOADING OPERATIONS.**

A concise summary of the facts is necessary to understand the issues in this case.

Appellant was injured while working as a longshoreman aboard the SS Santorini, a Liberty ship, at Coos Bay, Oregon, on February 4, 1955 (R. 76, 113). The vessel arrived in port the day before to load a cargo of lumber and the Independent Stevedoring Company, libelant's employer, was engaged to perform this operation. At about 4:30 p.m. on the day preceding the accident complained of, both the preventer wire and the rope guy holding the starboard boom in place at No. 2 hatch parted because of rust and wear and tear on the preventer (R. 113, 158-9). The ship's Chief Mate, Kyriacos, replaced the broken wire and guy with new lengths from the ship's locker.

During the morning of February 5th, appellant had been working No. 1 hatch. He went to lunch with his gang at 11 a.m. in order to relieve the regular No. 2 hatch gang during the noon hour. The accident occurred during this relief of the gang which had worked the No. 2 hatch for four hours in the morning (R. 77, 78).

At about 12:15 p.m. libelant was performing his

duties as hatch tender at No. 2 hatch while a load of lumber was being hoisted aboard. The port boom was swung out over the dock and the starboard boom was positioned over the starboard side of the vessel. Each boom was held in place by a steel wire preventer and a rope guy. The preventer was rigged from the boom through a pad eye on the bulwark, back through an after pad eye, then back through the pad eyes where it was tied off with a half hitch (R. 101, 103, 105, 114). The rope guy ran from the peak of the boom to the rail at an angle to the preventer and was rigged between two double blocks, one located at the end of the pendant and the other at the end of the strap (R. 92-93, 119, 120). The guy passed between the two blocks three times and on the fourth turn it was tied to the pendant (R. 93).

Cargo runners ran from winches at the foot of each boom through blocks at the peaks of the booms, where they were joined together with a cargo hook. Wire slings were wrapped around the loads of lumber and attached to cargo hook. The loads were then lifted to the ship from the dock. Libellant's Exhibit 8, a motion picture film, illustrates the manner in which the booms were rigged at the time appellant was injured.

At the said time and place, the preventer wire and guy line holding the starboard or offshore boom again parted. Inasmuch as appellant was standing on the port side in the middle of the deck load near the forward edge of the hatch, he immediately tried to avoid the boom and gear swinging toward him, but he slipped to the deck and sustained a broken right ankle (R. 82-84, 99).

Appellant was removed by basket from the ship and was taken to the McCauley hospital in Coos Bay where he was treated. X-rays were taken and a cast was applied after the fracture was diagnosed (R. 85, 86). Appellant was discharged from the hospital on February 11th, but during the course of healing, his right leg became afflicted with severe dermatitis under the cast. On February 22nd, the original cast was removed, the dermatitis was treated, and another cast applied (R. 60-61). Three weeks later it was necessary to replace the cast with a plaster shell that could be removed and put back on by the patient. Libelant was unable to return to work until June 27th, nearly five months after the injury. He is unable to do hold work but he can work the winches (R. 86, 88). While the fracture has healed properly in that the bones are in good alignment, libelant still has some limitation of motion in the ankle, and daily pain and suffering which will be permanent, and a permanent impairment of his capacity to do manual labor. His leg is discolored from the dermatitis, and this condition will be permanent (R. 62-64; 86-90). Libelant's right foot appears swollen as compared with his other foot (R. 88-89).

After the accident to appellant the ship caused two preventers to be re-rigged in place of the one which broke (R. 97-98).

The overriding legal issue in this case is whether appellees' vessel was rendered unseaworthy by reason of a preventer wire which broke while loading operations were being carried on in a normal, usual and customary

manner, without an unusual strain on the wire or an excessive load (R. 91, 106, 109, 110, 111, 126-7).

The record indicates that the wire broke because of a greater pull on the wire than it could stand; metallurgical examination found no evidence of rust or other defect and the expert witness concluded that preventer suffered a simple "tensile break" (R. 136-7).

On the other hand, the evidence is undisputed that the cargo being hoisted at the time of accident weighed at most one and a half tons (R. 106) and was being handled in a prudent and safe fashion (R. 109-11; 126-7). There was no evidence that the longshoremen were engaged in the outlawed practice of "tightlining," that is, setting one winch to pull against the other in order to raise the load higher than usual to clear obstructions. The Court explicitly stated that there was no evidence of "tight-lining" (R. 30-31). Indeed, uncontradicted evidence shows that there was sufficient "drift" in the rigging (R. 109, 126).

If the load was being handled in a safe, prudent manner, if the wire showed no obvious defects, and if it was new and in use for less than a day, what then caused a wire, rated at nearly eight times the tension on it at the time of the break, to give way (R. 139, 140)?

The probable answer is provided by Captain Herman Larsen, one of appellees' expert witnesses. Captain Larsen testified as follows:

MR. WOOD:

"Q. Captain, based on your experience, what is the effect of jerking or over-straining of a wire rope

as to whether the failure or parting of a wire rope always occurs at the moment it is over-strained or whether a series of over-straining can cause a breaking at a later moment?

* * * * *

A. I have found in my experience that a wire and a rope can be damaged by over straining and by jerking and a weakness will later show up where the strain was on the wire or rope.

Q. Under such conditions have you known a wire rope to part under what would be a normal or customary lift?

* * * * *

A. It is quite true and I have found that if a wire rope were damaged and the damage was not detected and then the usual strain was put on it, that could cause it to break." (R. 151-2)

In summary, this is a case where a new wire preventer breaks in normal use without any evidence of defect other than an ordinary "tensile break." The testimony of Captain Larsen makes it clear that the wire became weakened either before use, or during the time it was rigged as a preventer on the SS Santorini. Moreover, the sharp bend of the wire at the pad eye caused by the lack of a cleat with which to secure it may have contributed to the accident (R. 142), for the break occurred at a point about one and one half feet from the pad eye (R. 101, 105-6). Finally, the evidence is that the wire preventer was made of "mild plow steel" rather than "plow steel"—a harder substance—usually used aboard American vessels for this purpose (R. 139, 140, 116-18). These factors undoubtedly related to the breaking of the preventer.

Under this evidence it is clear that the SS Santorini

was unseaworthy as a matter of law in that its preventer wire was defective and weakened at the time libellant suffered his injury. It does not matter that the ship did not, or could not, know of the weakness in the wire, nor is it relevant that the weakness in the wire might have been caused by the acts of the longshoremen engaged in loading the vessel.

"Thus liability for all damages proximately resulting from any breach of the implied warranty of seaworthiness is imposed by law upon the shipowner, regardless of whether or not the unseaworthy condition aboard the vessel, or indeed the vessel itself, happens to be within the owner's control * * * and regardless of whether or not the defect was known, or in the exercise of due care could have been known to the shipowner. *Boudoin v. Lykes Bros. SS Co.*, supra, 348 U.S. at page 339, 75 S. Ct. 382; *The Edwin I. Morrison*, 1894, 153 U.S. 199, 210, 14 S. Ct. 823, 38 L. Ed. 688; *Lahde vs. Society Armadora Del Norte*, 9 Cir., 1955, 220 F. 2d 357, 360."

Reynolds v. Royal Mail Lines, Ltd., D.C. Cal., 1956, 147 F.S. 223 at 227.

In the recent case of *Grillea v. U. S.*, 232 F2d 919, the Second Circuit held in favor of a longshoreman who fell through a hatch whose covers had been improperly laid by the injured stevedore and his companion, only a short time before the accident. The Court stated the applicable law:

"It may appear strange that a longshoreman, who has the status of a seaman, should be allowed to recover because of unfitness of the ship arising from his own conduct in whole or in part. However, there is in this nothing inconsistent with the nature of the liability because it is imposed regardless of fault; to the prescribed extent the owner is an insur-

er, though he may have no means of learning of, or correcting, the defect. Indeed, as to these it is a kind of 'Workmen's Compensation Act': though limited by the value of the ship and the fact that it only covers injuries caused by the defects that we have mentioned. The following passage from *Sea Shipping Co. vs. Sieracki*, 328 U. S. 85, 94, 66 S. Ct. 872, 877, 90 L. Ed. 1099 expresses the considerations that lie behind it. The owner

"is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.

"These and other considerations arising from the hazards which maritime service places on men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowners' liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well known instances in our law. * * * It is a form of absolute duty owing to all within the range of its humanitarian policy.' "

232 F 2d 923.

The leading case of *Mahnich v. Southern SS Co.*, 321 U.S. 96, 88 L. Ed. 561, 64 S. Ct. 455, appears to be on all fours with the case at bar. There, a seaman received injuries when he fell from a staging which gave way when a piece of defective rope supporting it parted. The rope was supplied by the mate, and the Court held that the staging "was inadequate for the purpose for which it was ordinarily used * * *." Furthermore, the Court pointed out, "its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable." 321 U.S. 103.

Alaska SS Co. v. Petterson, 347 U.S. 396, 98 L. Ed. 798, 74 S. Ct. 601 (1954) reaffirms the absolute, non-delegable duty of the shipowner to furnish a seaworthy hull and appliances as stated in *The Osceola*, 189 U.S. 158, and in *Seas Shipping Co. v. Sieracki*, supra. In *Petterson*, the injured party and his fellow longshoremen rigged a block which had been standing on the deck of the ship. It was of a type used in ship's gear as well as by stevedoring companies. The block was treated by all of the courts as having been brought aboard the ship by the stevedores. While being used in a proper manner, it broke, causing some of the gear to fall and crush Petterson's leg. There was no particular defect found to be the cause of the block breaking. The only evidence was that it was being used properly and it gave way. Mr. Justice Burton in his dissent assumed that the block was defective, and this Court of Appeals in its opinion said:

"If the block was being put to a proper use in a proper manner, as found by the District Judge, there is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy." 205 F 2d 479.

This Court stated that it did not rely on the negligence concept of *res ipsa loquitur*, but rather, on the fact that the warranty of seaworthiness is a specie of strict liability regardless of fault. Negligence, or control of the instrumentality, by the ship is not a prerequisite for liability. "It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists." 205 F 2d 479.

Where the appliance causing injury is being used in

the usual and proper manner, the courts show little concern over the exact reason for its failure. That it did not serve the purpose for which it was intended is the only consideration. This is illustrated not only by the *Pettersson* case, but also by later cases such as *Wiel and Amundsen v. Potter*, 228 F 2d 341, decided by this Court, and *Caudill v. Victory Carriers, Inc.*, D.C. Va., 1957 AMC 772.

In *Potter*, this Court held that a rail with an unsecured rod was unseaworthy and imposed liability on the vessel.

The *Caudill* case was an action for personal injuries received by an army stevedore who was injured while descending a Jacob's ladder from the deck of defendant's vessel to a barge. A rope on the ladder parted from fatigue, or wear and tear. The Court held the vessel to be unseaworthy for furnishing such an appliance regardless of who owned or controlled it. Moreover, the Court was unconcerned as to whether the weakness in the rope was obvious or hidden, or known or unknown to the ship.

Reference is also made to *Pope & Talbot v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953), where a carpenter was injured by falling through an open hatch. There was no mention in the Supreme Court's opinion that the shipowner or his officers knew of the opening. The Court held that the vessel was unseaworthy and imposed liability on it.

Thus in the case at bar, all that is necessary for libellant to show is that an appliance was being properly

used, and that it failed. Under *Petterson*, there is an inference that it was defective, and respondent's metallurgical evidence that the wire was not rusted or brittle fails to establish that it was sound; for if it was perfect, why was it unable to handle a load weighing only one-eighth of its tensile strength? The Trial Court, in seeking to pin-point some fault or defect in the wire, ignores the true nature of the warranty of seaworthiness, that it is a liability without fault. It is in the words of the Second Circuit, "a kind of Workmen's Compensation Act."

Ancient law made seamen, and those who do their work, wards of admiralty. The modern applications of this principle recognized the unusual hazards to which men who work on ships are exposed, and with the advent of insurance to spread the risk throughout the community of those who benefit from maritime activity, the Courts of Admiralty have insisted that persons injured by appliances which prove inadequate for the purpose for which they were intended shall have adequate compensation.

In the case at bar, a preventer wire was inadequate for the purpose for which it was intended, and a human being was injured thereby. The vessel was thus unseaworthy and libellant should recover compensatory damages.

II.

**APPELLANT'S GENERAL DAMAGES FOR HIS FRACTURED
RIGHT ANKLE AND RESULTING PERMANENT IMPAIRMENT
OF HIS ABILITY TO WORK, PERMANENT PAIN, AND
DISCOLORED SKIN, SHOULD BE ASSESSED
AT \$15,000.00.**

Appellant incurred a serious and painful injury in attempting to avoid the swinging boom after the preventer wire broke. The extent of his injuries are indicated in part by the fact that he was unable to work from February 5, 1955, when he was hurt, to June 27th (R. 86). Appellant still has pain in the ankle every day:

“Q. Have you ever spent a day since this accident when that foot is free of pain, when you haven't done any work at all?

A. No.” (R. 90.)

During the time the ankle-bone was mending, appellant developed dermatitis under the cast and this has resulted in a permanent discoloration of the skin of the right leg (R. 61-62). Appellant's physician, Dr. Garner, testified that it is probable that within three years appellant will have traumatic arthritis in the affected ankle joint because of the injury to the soft tissue near the break (R. 63). At the present time, appellant still has a limitation of motion in the ankle, swelling, and he cannot do heavy work in the holds of ships (R. 63, 65, 88, 89).

There can be no doubt that general damages should include in addition to past pain and suffering, an allowance toward future pain, loss of future earnings, resulting from an impaired capacity to work, humiliation, em-

barrassment and inconvenience resulting from a stiff, painful and swollen ankle which affects the gait, and a marked discoloration of the skin on appellant's leg. Appellant was 45 years of age at the time of the accident and he therefore had a life expectancy of 25.21 years. That is a long time for a human being to bear the physical and mental effects of such an injury as appellant has suffered. The \$5,000.00 found by the Court as general damages amounts to less than \$200.00 per year for the rest of appellant's life.

A survey of appellant's injuries must inevitably lead a fair-minded person to the conclusion that the finding of the Trial Court as to his general damages was grossly inadequate. We believe that a figure three times that amount—\$15,000.00 would not be an excessive award to appellant.

CONCLUSION

The preventer wire which broke was inadequate for the purpose for which it was properly used. The ship was therefore unseaworthy and the judgment should be reversed. If the Court finds that appellant should prevail, his general damages should be increased to the sum of \$15,000.00.

Respectfully submitted,

PETERSON, POZZI & LENT,
FRANK H. POZZI, and
GERALD H. ROBINSON,
Proctors for Appellant.



No. 15592

United States
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for the Ninth Circuit

GLEN TITUS,

Appellant,

vs.

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PANY, Charterer of the SS Santorini, etc.

Appellees.

BRIEF FOR APPELLEES

*Appeal from the United States District Court for the
District of Oregon.*

FILED

OCT 31 1957

PAUL P. O'BRIEN, CLERK

WOOD, MATTHIESSEN, WOOD & TATUM,
ERSKINE B. WOOD,
JOHN R. BROOKE,

Proctors of Appellees.



INDEX

	Page
Statement of the Case	1
Argument:	
Findings of the Trial Court Should Not Be Dis- turbed as They Are Fully Supported by the Evidence	3
The Preventer Wire Was in Good Condition and Seaworthy	3
Discussion of Appellant's Argument	5
The Number and Position of the Pad Eyes and Cleats Had Nothing to do with the Accident....	8
Damages	9
Conclusion	10

INDEX OF CASES

Mahnich v. Southern Steamship Company, 321 U.S. 96.....	7
McAllister v. The United States, 348 U.S. 19, 20, 99 L. Ed. 20 (1954).....	3
Petterson v. Alaska Steamship, 205 F. (2d) 478.....	7



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Appellees.

BRIEF FOR APPELLEES

*Appeal from the United States District Court for the
District of Oregon.*

STATEMENT OF THE CASE

Appellant Titus was injured aboard the SS SANTORINI on February 5, 1955, while working as a longshoreman in the employ of Independent Stevedoring Company, master contracting stevedores. Instead of accepting compensation from his employer, he brought this third party suit against the vessel and its owners.

At the time of the accident, the vessel was port side to the dock at Coos Bay, Oregon. It was being loaded

with a cargo of lumber by the stevedore company. It had a deck load of lumber about 6 feet high.

The accident happened while the longshoremen were using the vessel's loading gear at the forward end of #2 hatch. As a load of lumber was being hoisted aboard, the preventer wire ($\frac{3}{4}$ inch steel wire rope) and rope guy (3 inch manila rope) which held the starboard, or offshore, boom in position, broke. This caused the boom and draft of cargo to swing, and appellant, while running to avoid being hit, slipped and fell injuring his right ankle.

The preventer wire and rope guy were brand new. They had been installed on the starboard boom late in the afternoon of the day before the accident (R. 158). The rope guy and preventer wire were rigged from the top end of the starboard boom to the vessel's rail. The strain on the rope guy and preventer wire had been equalized, so both were equally holding the boom. The rope guy had been rigged through two blocks, so that four lengths of the rope were holding the boom (R. 121). This increased the breaking strength of the rope guy four times (R. 141). The breaking strength of the preventer wire was 14.4 tons (R. 139). Breaking strength of the rope guy (four lengths) was eighteen tons (R. 141, 145).

The preventer wire was secured at the rail by passing through a pad eye, and then to a cleat. The break occurred at least a foot to a foot and a half above the pad-eye, and at a point beyond any possible weakening effect from the bend at the pad-eye.

A full trial was held before the Honorable Chase A. Clark. Sections of the preventer wire and rope guy were produced in evidence. After written briefs were submitted by the respective parties, the trial court found the preventer wire and rope guy were new and without defect, and of proper size and strength for the work for which they were being used, and seaworthy, and a decree was entered in favor of appellees.

This appeal is an attack upon the trial court's findings of fact.

ARGUMENT

FINDINGS OF THE TRIAL COURT SHOULD NOT BE DISTURBED AS THEY ARE FULLY SUPPORTED BY THE EVIDENCE

Appellant's brief and specifications of error are an attack on the trial court's findings of fact. Since most of the pertinent evidence was heard in open court, it is well settled in admiralty that findings of fact of the trial court will not be disturbed unless clearly erroneous.

McAllister vs. The United States, 348 U.S. 19,
20, 99 L.Ed. 20 (1954).

THE PREVENTER WIRE WAS IN GOOD CONDITION AND SEAWORTHY

Appellant's theory of liability was that the preventer wire was defective and unseaworthy. (See the contentions of libelant in the Pre-trial Order, R. 13.) The trial Judge heard the evidence and saw the witnesses and found against libelant.

The Court's finding of fact is as follows:

"VI

"The preventer wire that parted at the time and place of libellant's injury was brand new and without defect. There was no wear, corrosion, brittleness or other condition which would render the wire unseaworthy. It was of proper size and strength for the work for which it was being used." (R. 42)

This finding of fact is abundantly supported by the evidence. Appellee's proof showed the preventer wire and also the rope guy were free of defects. Both the preventer wire and the rope guy were produced in evidence (Pre-trial Exhibits 3a, b and 3c, d). The evidence established the preventer wire was new (R. 158), without defect (R. 136, 137), with a breaking strength of 14.4 tons (R. 139), which is the breaking strength of preventer wires regularly and customarily used on American Liberty and Victory type vessels (R. 144). The rope guy was shown to be new three inch manila rope (R. 144, 157, 158), without defect (R. 144, 148), which was rigged in the usual and regular manner (R. 93), so its breaking strength was quadrupled (R. 141), It was further shown that rope guys on vessels are ordinarily three inch manila rope (R. 148). Three inch manila rope has a breaking strength of 9,000 lbs. (R. 140, 145), and when quadrupled this amounts to 18 tons.

A section from each side of the break of the preventer wire was given to Harry Czyzewski, a metallurgical engineer with excellent qualifications, who made an examination and analysis of the wire (R. 132-134). He made a microscopic examination, hardness tests, and metalagraphic examination of the internal structure of the metal (R. 135).

He found no corrosion, wear, signs of brittleness, or other defect (R. 136, 137). He found the wire had a breaking strength of 14.4 tons (R. 139), and that the break was a tensile break—that is, the break occurred because a force had been exerted on the wire beyond its breaking strength (R. 137).

Another witness, Captain Herman Larsen, an experienced Master in the American Merchant Marine, and who was also an experienced stevedore company walking boss, familiar with the rigging of vessels' cargo gear, also testified that he had examined the wire and found it to be in perfect condition (R. 146, 147, 150).

Likewise, the vessel's Chief Mate, John Kyriacos, with 25 years experience (R. 154), testified the preventer wire was brand new (R. 158). He inspected it before and after the accident and found it in good condition (R. 159).

The preventer wire's strength of 14.4 tons was the same as that ordinarily and regularly found on American Liberty and Victory type vessels (R. 144).

The foregoing evidence and the actual production of the exhibits in court abundantly support the trial court's finding of fact.

DISCUSSION OF APPELLANT'S ARGUMENT

Appellant's case was based only on testimony of libellant and other longshoremen that the wire broke while the loading operation was being done in the ordinary and usual manner and with a normal size load.

From this evidence, appellant hoped to create an inference that the preventer wire was defective.

It is true that in the absence of any other proof as to the condition of the preventer wire, evidence that it broke while the loading operation was being done in the ordinary and usual way with a normal size load could create an inference that it was defective. But in the present case there was abundant, positive evidence, including production of the actual wire itself, to show that it was not defective. In the face of the abundant, positive evidence that the wire was in good condition, the trial Judge declined to draw the inference that it was defective.

At the best, evidence that the loading was being done in an ordinary and regular way is a generality, and involves a great many variable factors. Some of these are the type of cargo, slings, winches, holds, booms, dock, and especially important, the human element of the winch drivers and hatch tenders. They may put an excessive strain on the gear by the jerking of a load or by continuing to pull with the winches when the load catches under the hatch coaming or against a rail, or by raising a load too high and thus creating a tight line condition with the winches pulling against each other. It is therefore impossible to say accurately that the loading operation, at the instant the wire broke, was being done exactly the same as on other occasions. The trial court saw and heard the witnesses, rejected the inference, and made the positive finding that the wire was in good condition. This is fully supported by the evidence.

Appellant places great reliance upon the decision of this Court in *Petterson v. Alaska Steamship*, 205 F. (2) 478. In that case, the Court drew the inference that a block which broke was defective because it broke while being put to a proper use in a proper manner. That was a proper inference to be drawn in the *Petterson* case because, as stated in the opinion, "There was no proof as to the condition of the block prior to its use, other than what may be implied from the accident."

In the present case, to the contrary, there is abundant proof as to the condition of the wire, and all of that proof showed that the wire was new and in good condition and of proper size and strength for its intended use.

The other case appellant cites as being "on all fours with the case at bar" is *Mahnich v. Southern Steamship Company*, 321 U.S. 96. It is not in point. In the *Mahnich* case a rope holding a staging broke, causing an accident. After the accident, examination of the rope at the point where it broke showed it was so rotted as to be unable to hold the staging. But here the proof is just opposite. Examination afterward showed the wire and rope to be free of defect and of sufficient strength for the purpose intended.

It is interesting to note why appellant chose to attempt to prove his case indirectly by inference. The record shows that a law clerk in the employ of appellant's proctor was on the vessel shortly after the occurrence (R. 68), that he obtained three strands from the broken preventer wire, two from one side of the break and one

from the other (R. 71, 136). The record further shows that by court order appellant had a right to see and inspect the sections of the preventer wire in the possession of appellees (R. 11). The record further shows that appellant had the strands in his possession examined by an expert and had one of the strands chemically analyzed (R. 175). The chemical analysis destroyed one of those strands and it was not produced at the trial (R. 176). The record further shows that only after pressing appellant's proctor did he reluctantly admit near the end of the trial what had happened to the missing strand (R. 176). Appellant did not call its expert witness to testify nor did he intend to explain why one of the strands was missing.

From this it may be inferred that appellant's own expert, if he had been called as a witness, would have given testimony adverse to appellant. In other words, appellant's own direct evidence would also establish that the wire was in good condition so appellant failed to produce that evidence and attempted to rely on an inference, which the trial Judge rejected.

**THE NUMBER AND POSITION OF THE PAD EYES
AND CLEATS HAD NOTHING TO DO
WITH THE ACCIDENT**

Because appellant's brief makes reference to the location and number of pad eyes as a possible basis for holding the vessel unseaworthy, we will briefly cover this contention. This possibility can be quickly and completely put to rest.

The trial Court expressly found

"IX

"The preventer wire that parted had been secured at the ship's rail by being passed through a pad eye and then forward to a cleat. The break in the preventer wire occurred at least a foot to a foot and a half above this pad eye. The break occurred at a point well beyond any possible weakening effect caused by the angle of the preventer wire at the pad eye. The angle at the pad eye did not cause or contribute to the breaking." (R. 43)

This finding is fully supported by the evidence. Chief Officer Kyriacos testified the break was 3 feet above the pad eye (R. 164). The stevedore company's walking boss Hasan testified the break was a foot to a foot and a half above the pad eye (R. 101). The uncontradicted testimony showed that there could be no weakening effect on the preventer wire beyond 6 inches from the bend at the pad eye (R. 141). There is no evidence to the contrary.

DAMAGES

Unless this Court reverses the findings of the trial court on the issue of liability, this part of the appeal is extraneous. For that reason our only comment is that the experienced trial court's finding of damages was made after hearing all the evidence, seeing the injured ankle and evaluating the injury. That finding is not clearly erroneous.

CONCLUSION

This is an appeal attacking the findings of the trial court. Those findings are fully supported by the evidence and are clearly correct. Positive proof showed the preventer wire and rope guy were of proper size and strength and free of defect, hence seaworthy. We therefore respectfully submit the trial court's findings should not be disturbed and its decree should be affirmed.

Respectfully submitted,

WOOD, MATTHIESSEN, WOOD
& TATUM,

ERSKINE B. WOOD,
JOHN R. BROOKE,

Proctors for Appellees.

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10/21/14

10/21/14

10/21/14

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	8
Appeal:	
Bond for Costs on	48
Certificate of Clerk to Transcript of Record on	53
Notice of	47
Order Extending Time to Docket	49
Order to Forward Exhibits on	49
Statements of Points and Designation of Rec- ord on (USCA)	179
Statement of Designation of Record on (USCA)	183
Bond for Costs on Appeal	48
Brief of Libelant	20
Certificate of Clerk to Transcript of Record ..	53
Decree	45
Decree, Proposed by Respondents	36
Designation of Record (USCA-Libelant-Appel- lant's)	181

ii.

Designation of Record (USCA-Claimant-Appelee's)	183
Docket Entries	50
Findings of Fact and Conclusions of Law	40
Findings of Fact and Conclusions of Law Proposed by Respondents	31
Letter dated March 1, 1957, Ina Mae Wheeler, Law Clerk to R. DeMott, Clerk	39
Libel in Rem and in Personam	3
Minute Orders:	
Jan. 17, 1956—Record of Trial	19
Feb. 6, 1956—Order Allowing Time to File Briefs	19
Names and Addresses of Proctors	1
Notice of Appeal	47
Objections and Amendments to Respondents' Proposed Findings of Fact and Conclusions of Law	37
Opinion of Judge Clark	27
Order Allowing Time to File Briefs	19
Order dated April 18, 1955 to Produce Pre- venter Wire	11
Order Extending Time to Docket Appeal	49
Order to Forward Exhibits to Court of Appeals	49
Pre-Trial Order	11

iii.

Statement of Designation of Record to be Printed (USCA-Claimant-Appellee's)	183
Statement of Points and Designation of Record (USCA-Libelant-Appellant's)	179
Transcript of Proceedings and Testimony	55
Witnesses:	
Chavios, Nick	
—direct	68
Czyzewski, Harry	
—direct	131
—cross	142
—redirect	143
Garner, John W.	
—direct	56
—cross	65
—redirect	66
Gunn, William Wilton	
—direct	107
—cross	110
Hasan, William	
—direct	95
—cross	104
Johnson, John P.	
—direct	122
—cross	127
—redirect	129

Transcript of Proceedings—(Continued):

Witnesses—(Continued):

Kyriacos, John (Deposition)

—direct	153
—cross	162
—redirect	171, 174
—recross	171

Larsen, Herman

—direct	145
—cross	152

Thrush, Leon E.

—direct	112
—cross	120
—redirect	121
—recross	122

Titus, Glen

—direct	74
—cross	90
—redirect	94
—rebuttal, direct	177

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For

In the District Court of the United States
for the District of Oregon

Civil No. 7957

GLEN TITUS,

Libelant,

vs.

SS SANTORINI, her engines, tackle and gear, and
all persons claiming any interest therein, and
MADAM CADIO G. SIGALAS, et al., own-
ers, and PACIFIC ATLANTIC STEAMSHIP
COMPANY, charterer, Respondents.

LIBEL IN REM AND IN PERSONAM WITH
FOREIGN ATTACHMENT

To the Honorable Judges of the United States Dis-
trict Court for the District of Oregon, in Ad-
miralty Sitting:

The libel and complaint of Glen Titus, longshore-
man, in a cause of personal injury and tort, civil
and maritime, against the SS Santorini, her en-
gines, tackle and gear, and all persons claiming
any interest therein, and Madam Cadio G. Sigalas,
et al., owners, and/or charterer Pacific Atlantic
Steamship Company, respectfully shows on informa-
tion and belief:

Article I.

That during all times herein mentioned the SS
Santorini was and now is and during the currency
of process herein, will be, in the port of Coos Bay,
State of Oregon, and upon navigable waters of the
United States of America and within the jurisdic-

tion of this Court; that at all times herein mentioned the owner and operator of said vessel was and now is Madam Cadio G. Sigalas, et al., a corporation, company or concern, of Athens, Greece, owned by Greek Citizens, and the charterer was and is Pacific Atlantic Steamship Company, a corporation of the State of Washington, United States of America.

Article II.

That at all times herein mentioned libelant was a longshoreman and on or about February 3, 1955, was engaged in assisting to load said vessel with lumber at the Coos Bay Lumber Company dock in the Port of Coos Bay and libelant and other longshoremen were in the employe of a master stevedore, to-wit, Independent Stevedoring Company, who had contracted with said owner and/or charterer to load said vessel, when the libelant met with the injuries and accident hereinafter set forth.

Article III.

That while libelant was performing his duties as a longshoreman on said date on deck at No. 2 Hatch on said vessel the preventer wire broke, causing this plaintiff to sustain serious personal injuries and said accident and injuries were caused solely by the unseaworthiness of said vessel and its appurtenances and the negligence of said shipowner and/or operator and/or charterer, their agents, officers or representatives, in that said preventer wire was defective, in that they failed to inspect said wire before using it, in that they used an improper

wire as a preventer, from all of which this libelant was caused severe bruises and contusions to his body and limbs, multiple fractures of his leg, dislocated ankle, a severe tearing, twisting, wrenching of the muscles, tendons, ligaments and soft tissue of his body and limb, physical and mental pain and suffering, from all of which libelant has been and will be rendered sick, sore, nervous and distressed, and has sustained permanent injuries, and his ability to work and perform labor is seriously and permanently impaired, and all to his damage in the full sum of \$40,000.00.

Article IV.

That libelant has incurred doctor, hospital and medical expenses and will incur further of the same, and has lost and will lose wages on account of said accident, and libelant reserves the right to plead and prove said special damages at the time of trial.

Article V.

That libelant elects to pursue a remedy against a third person, pursuant to the provisions of the Longshoremen's and Harborworkers' Act of the United States and has filed with the United States Department of Labor, Bureau of Employees Compensation, a notice of election to sue.

Article VI.

That said owners of said vessel are non-residents of the United States and of the State of Oregon and said owners can not be found within the jurisdiction of this Honorable Court; that said owners

have effects within the jurisdiction of this Court, to-wit, the SS Santorini, a steamship. That said vessel is presently moored at the Port of Coos Bay, Oregon, at what is known as Coos Bay Lumber Company Dock; that said vessel is in the possession of and that person is bailee of said vessel and said person's name is John Doe, the master of said vessel, who holds said vessel in effect as a garnishee.

Article VII.

That libelant's residence, domicile and address is Coos Bay, Oregon.

Article VIII.

That at the time of the happening of this accident libelant was of the age of 45 years with a life expectancy under the American standard mortality tables of 25.21 years.

Article IX.

That all and singular of the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore, libelant prays that process according to the course of this Honorable Court in a cause of admiralty and maritime jurisdiction may issue against the respondent vessel, SS Santorini, her tackle and gear, and that all persons claiming any interest in said vessel may be cited to appear and answer all and singular of the matters aforesaid; that this Court may be pleased to decree the payment of \$40,000.00 to libelant; that the respondent

vessel, SS Santorini, may be condemned and sold to pay the same; that citation in due form of law may issue against the respondent herein, Madam Cadio G. Sigalas, et al., and Pacific Atlantic Steamship Company, citing it and them to appear and answer in the premises; and in case said respondent owners or charterer can not be found within this jurisdiction then that all goods and chattels belonging to said respondent within the District and in particular a certain vessel known as the SS Santorini, presently berthed at Coos Bay Lumber Company Dock, Port of Coos Bay, Oregon, within this District, with its spare parts and accessories, all in the possession of said John Doe, master of said vessel, be attached by process of foreign attachment in the amount of \$40,000.00, the sum sued for in this libel, with interest and costs and disbursements of the libelant; and that said garnishee, John Doe, master of said vessel, be cited and admonished to appear and answer on oath as to the said effects of the respondent in his hands.

PETERSON & POZZI,

/s/ BERKELEY LENT,

Proctors for Libelant.

Duly Verified.

[Endorsed]: Filed February 9, 1955.

In the District Court of the United States
for the District of Oregon

Civil No. 7957

GLEN TITUS,

Libelant,

vs.

SS SANTORINI, her engines, tackle and gear, and
all persons claiming any interest therein, and
MADAM CADIO G. SIGALAS, et al., owners,
and PACIFIC ATLANTIC STEAMSHIP
COMPANY, charterer, Respondents,

SIGALAS and KULUKUNDIS,

Claimant.

ANSWER

To the Honorable Judges of the United States Dis-
trict Court for the District of Oregon, in Ad-
miralty Sitting:

Comes now the respondent, SS Santorini, and
claimant, Sigalas and Kulukundis, and in answer
to the libel in rem and in personam filed herein
admits, denies and alleges:

I.

Admits all allegations contained in Article I, ex-
cept denies that the owner and operator of the SS
Santorini was and now is Madam Cadio G. Sigalas,
et al., and alleges that Pacific Atlantic Steamship
Company, a corporation of the State of Washing-
ton, United States of America, was only a space
charterer of said vessel.

II.

Admits all the allegations contained in Article II, except denies that all of the injuries claimed by the libelant occurred on the SS Santorini at said time and place.

III.

Admits that a wire preventer broke at the Number Two Hatch of said vessel, but denies remaining allegations contained in Article III and the whole thereof.

IV.

Said respondent and claimant lack sufficient information to form a belief as to the trust or falsity of the allegations contained in Article IV and therefore deny the same.

V.

Said respondent and claimant lack sufficient information to form a belief as to the trust or falsity of the allegations contained in Article V and therefore deny the same.

VI.

No answer is made to the allegations of Article VI as said allegations are now moot.

VII.

Said respondent and claimant lack sufficient information to form a belief as to the trust or falsity of the allegations contained in Article VII and therefore deny the same.

VIII.

Said respondent and claimant lack sufficient information to form a belief as to the trust or falsity

of the allegations contained in Article VIII and therefore deny the same.

IX.

Denies that all and singular of the premises are true as alleged in the libel, but admits if true the same would be within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

X.

For an affirmative answer in defense, respondent and claimant allege that if the libelant received any injuries or damages at the time and place referred to in his libel herein, the same were proximately caused by his own carelessness and negligence in failing to keep a proper lookout, in failing to watch where or how he was moving and in failing to take due care or any care and caution for his own safety and welfare.

Wherefore having fully answered the libel herein this respondent and claimant pray for a decree in their favor dismissing the libel herein and awarding to them what in law and justice they may be entitled to receive.

WOOD, MATTHIESSEN, WOOD &
TATUM,

/s/ JOHN R. BROOKE,

Proctors for Respondent, SS Santorini and claimant, Sigalas and Kulukundis.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 6, 1955.

[Title of District Court and Cause.]

ORDER

This matter coming on for hearing on respondents' motion to require libelant to produce for inspection portions of a certain preventer wire, libelant appearing by Nels Peterson of his proctors and respondent-claimant appearing by John R. Brooke of its proctors, and the court hearing argument by both parties and being advised in the premises,

It Is Hereby Ordered that libelant produce and deliver to respondent-claimant for inspection that portion of the preventer wire in his possession and that respondent-claimant produce and deliver to libelant for inspection that portion of the preventer wire in its possession.

Dated this 18th day of April, 1955.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed April 21, 1955.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

Nature of Action

This is a libel in rem and in personam with attachment against the steamship SS Santorini, her engines, tackle and gear, claimed by Sigalas and Kulukundis, owners of said vessel, and against said owners, respondents in personam, and that a general appearance has been made by said owners.

The action is for damages for alleged personal injuries received by libelant and is based generally on the theories of unseaworthiness of the vessel and the negligence of said company.

Admitted Facts

(1) That libelant is a resident of the United States and District of Oregon and resides at Coos Bay, Oregon.

(2) That the SS Santorini was in the port of Coos Bay, Oregon, and upon navigable waters of the United States of America and within the jurisdiction of this Court at the time of the service of process herein.

(3) That a general appearance has been made by said owners and operators.

(4) That on and prior to February 5, 1955, libelant was engaged as a longshoreman by Independent Stevedore Company, master stevedores, who were loading said vessel at the Coos Bay Lumber Company dock at Coos Bay and upon navigable waters, and at the time of the accident complained of libelant was working at No. 2 Hatch.

(5) That libelant elected to pursue a remedy against a third party, pursuant to the provisions of the Longshoremen's and Harborworkers' Act of the United States and has filed with the United States Department of Labor, Bureau of Employees Compensation, a notice of election to sue.

Contentions of Libelant

(1) Libelant contends that said accident was

caused without any contributing fault or negligence on his part and solely by the defective and unseaworthy condition of said vessel and its appurtenances and by the negligence of said company, its officers, agents and employees, in the following, among other, particulars:

(a) That said vessel was unseaworthy in that a defective, unsafe and improper preventer wire was in use.

(a1) That said vessel was unseaworthy in that said wire broke.

(b) That said vessel was unseaworthy in that a soft wire was used as a preventer rather than hard wire.

(c) That said vessel was unseaworthy in failing to properly locate and have available sufficient pad eyes and cleats for securing preventer wires.

(d) That said owners and operators, their officers, agents and employees, were negligent in failing to supply a non-defective and proper preventer wire.

(e) That said company and owners, its officers, agents and employees, were negligent in equipping said hatch No. 2 booms with soft wire preventers rather than hard wire preventers.

(f) That said defendant company and owners, its officers, agents and employees, were negligent in failing to warn this libelant that improper preventer wire was used.

(g) In failing to provide this libelant with a safe place to work in all the particulars alleged herein.

(2) That as a proximate result of said unseaworthiness and said negligence while a load was on the hook a preventer wire gave way, causing this libelant to fall, causing him severe nervous shock, grievous physical and mental pain and suffering, bruises and contusions to his right leg, a severe tearing, twisting and wrenching of the tendons, ligaments, bones, soft tissue and muscles of his right leg, crushing and fractures of his right leg, dislocated ankle, injuries to his knee, dermatitis and disturbance of urinary function, from all of which libelant was rendered sick, sore, nervous and distressed, and has been caused to sustain permanent injuries, has had his ability to work and perform labor seriously and permanently impaired, will permanently have pain and suffering as a result of said injuries, and all to his damage in the full sum of \$40,000.00.

(3) That as a proximate result of said unseaworthiness and said negligence of said vessel and company, libelant has lost wages to date on account of said injuries in the approximate sum of \$3,000.00 and will lose further wages on account of said injuries.

(4) That at the time of the happening of said injuries libelant was of the age of 45 years with a life expectancy under the American standard mortality tables of 25.21 years.

(5) That at the time of said injuries libelant was regularly employed as a longshoreman and was and had been earning wages in excess of \$100.00 per week.

(6) That libelant's damages, general and special, were proximately caused by the unseaworthiness of said vessel and the negligence of said company, its officers, agents and employees.

(7) That medical expenses in the amount of \$402.50 have been necessarily incurred to date in connection with libelant's injuries, and he will incur further medical expenses.

(8) That libelant denies each of the contentions of respondent except as admitted in libelant's contentions or in the admitted facts.

Contentions of Respondent

(1) Denies the contentions of libelant.

(2) The proximate cause of said accident was the fault of the independent contracting stevedore company, its officers, agents, and employees, in that it arranged and rigged the gear and so operated the gear as to place undue and excessive strain upon the vessel's gear and particularly the preventer wire.

(3) Libelant was hatch tender and as such was responsible for the safe rigging and the manner in which the longshoremen performed their work and that the sole proximate cause of the accident was libelant's own negligence in allowing, directing, and

permitting the work to be done by the longshoremen in such a manner that as a result of arrangement of the rigging and the operation of the cargo gear, excessive strain was placed on the preventer wire.

(4) Libelant was negligent in failing to maintain proper housekeeping at said hatch and particularly in allowing hatch boards to be scattered on the inshore side of said hatch, in failing to maintain a proper lookout, and in failing to avoid tripping on the hatch boards and said negligence was the proximate cause of libelant's injuries and damages.

(5) In the event the aforesaid negligence of libelant was not the sole proximate cause, then it was at least a major contributing cause, and that libelant was guilty of contributory negligence to be considered in proportional mitigation of his damages.

(6) (Admitted Fact) At the time of the accident libelant, as well as the other longshoremen working said vessel, were employees of the Independent Stevedoring Co.

(7) The said preventer wire that carried away had been placed on said vessel's gear at the No. 2 hatch the day before libelant's accident and the longshoremen had arranged and rigged the gear including the securing of the preventer wires at said hatch.

(8) Among the duties of libelant at the time of

the accident was to see that the gear at the No. 2 hatch of said vessel was rigged and operated in a safe manner and the longshoremen at the No. 2 hatch had a safe place to work.

Libelant's Exhibits

1. Reserve for hospital records.
2. Medical notes, memoranda, etc., of Dr. ———.
3. X-rays.
4. (a) Wire cable.
5. (b) Wire cable.
6. Accident report.
7. Pictures.

Respondents' Exhibits

1. X-rays.
2. Medical notes, memoranda, etc., of Dr. ———.
3. (a) Wire cable.
(b) Wire cable.
(c) Manila rope.
(d) Manila rope.
4. Pictures.
5. Pacific Coast Safety Code.
6. Deposition of Libelant.
7. Deposition of John Kyriacos.
8. Machinery handbook.
9. Wire rope booklet.
10. Notes of metalurgist.
11. Vessel's loading records and lumber book.
12. Plastic holders (2).

The exhibits heretofore referred to have been

identified and received as trial exhibits, and the parties agree, with the approval of the Court, that no further identification of exhibits is necessary.

In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, such exhibits are subject to objection only on the grounds of relevancy, competency and materiality.

Expert Testimony

Libelant reserves the right to call expert witnesses. Respondent reserves the right to call expert witnesses.

This order represents the result of pre-trial conferences held between the parties, their proctors and judge presiding in open Court.

It Is Hereby Ordered that the foregoing constitutes the pre-trial order in the above entitled cause and supersedes the pleadings in the within cause, but may be amended after signature or during trial only upon agreement of the parties or by order of this Court to prevent manifest injustice.

Dated and Signed in open Court this 16th day of January, 1956.

/s/ CHASE A. CLARK,
United States District Judge.

/s/ NELS PETERSON,
Of Proctors for Libelant.

/s/ JOHN R. BROOKE,
Of Proctors for Respondents.

[Endorsed]: Filed January 16, 1956.

[Title of District Court and Cause.]

MINUTES OF THE COURT

January 17, 1956

Now at this day come the parties hereto, by their proctors as of yesterday. Whereupon, the trial of this cause before the Court is resumed. The Court having heard the evidence adduced, and the arguments of proctors, renders its opinion herein, and directs that findings of fact and decree be prepared in accordance therewith.

[Title of District Court and Cause.]

MINUTES OF THE COURT

February 6, 1956

Libelant appearing by Mr. Frank Pozzi, of proctors, and the respondents by Mr. John R. Brooke, of proctors. Whereupon, the Court withdraws its opinion previously rendered herein, and takes this case under advisement.

It Is Ordered that the libelant be, and is hereby, allowed ten days after the transcript is furnished, within which to file his brief; that the respondents be, and are hereby, allowed ten days thereafter, within which to file their answering brief, and that the libelant be, and is hereby, allowed five days thereafter within which to file his reply brief.

[Title of District Court and Cause.]

LIBELANT'S BRIEF

Introduction

The Court has requested that we submit to it a memorandum in the within case.

This action is one based upon unseaworthiness and negligence against a third party ship owner and operator, and the vessel itself, through a libel in rem as well as in personam with foreign attachment. The Court will recall that the vessel, the SS Santorini, was lying port side to a dock at Coos Bay, Oregon, and that libelant was injured at approximately 12:15 p.m. while his gang was relieving the regular longshore gang at the hatch. The Court will also recall that libelant's severe injuries occurred when the starboard preventer wire gave way and libelant, while trying to get out of the way, received his injuries.

Points and Authorities

Petterson v. Alaska S.S. Co., (9th CA) 205 F. (2d) 478, 1953 A.M.C. 1405; Aff'd. 347 U.S. 396, 1954 A.M.C. 860;

Seas Shipping Co. v. Sieracki, 328 U.S. 94, 1946 A.M.C. 704;

Pacific Far East Lines v. Williams (9th CA), 1956 A.M.C. 1092;

Grillea v. U. S., 1956 A.M.C. 1009;

Wiel & Amundsen v. Potter, 1956 A.M.C. 147;

Williams v. Lykes Bros. S.S. Co., 1955 A.M.C. 2045;

Ignattuk v. Tramp, etc., 1955 A.M.C. 892.

Argument

The Court requested respondent to have transcribed its own testimony and it has done so, however, the Court does not have before it the testimony of libelant and the witnesses produced by him. We deem it important then that the Court recall some of their testimony, as well as that of respondent's testimony.

Mr. Titus worked in Gang No. 16. The SS Santorini started working at 1:00 o'clock p.m. on the day preceding the accident complained of. At approximately 4:00 p.m. or 4:30 p.m. in the afternoon of the 4th, the preventer wire on the same boom with which we are here concerned, as well as the rope guy, broke. (Resp. Tr. 34, 35.) The mate, Kayriacos, testified further that he had the boom rerigged and that the longshoremen then worked in the hatch, starting the next morning, and that the accident to Mr. Titus occurred about 12:15 p.m.

The Court saw the complete operation when it saw the moving pictures. I wish at this time to refresh and recall to the Court's memory the fact that the longshoremen were so careful in working this ship that they had even removed the wooden stanchion on the port side at No. 2 Hatch adjacent to the square of the hatch in order not to have to hoist loads over the top of the stanchion. Thus there was a "drift" of at least 35 feet. I believe this is important because it does show the care with which the longshoremen work. This Court must realize that the longshoremen enforce safety strictly in order to protect their own life and limb.

The Court will further remember that libelant's witnesses testified, as well as respondent's mate, that there was only one cleat and two padeyes for both No. 1 and 2 Hatches on the starboard side. This meant that the wires could not be tied off properly on the bullrail, and constitutes both unseaworthiness and negligence. This helps explain why the wire broke.

Mr. Kayriacos, respondent's mate, testified that he went out immediately after the accident and examined what was left of the wire on the padeye and that the wire had broken at the padeye. (Resp. Tr. 40.) At the same time he started talking about "three feet" but he explains this at Resp. Tr. 42 in that the "three feet" to which he was referring was that the bullrail was three feet above the deck. This testimony is somewhat in conflict with one or two of libelant's witnesses who testified that it was about 6 inches to a foot or a foot and a half from the padeye where the wire rope broke. Therefore, it can be seen that respondent's own witness made a much stronger case for libelant than libelant's own witnesses. This is made clear by the testimony of the so-called "expert", namely Mr. Czyzewski, who testified that when a wire rope leads down from a boom to a padeye and takes a sharp turn, that the wire is substantially weakened to a space of about six inches from the apex. (Resp. Tr. 13.)

The Court advised us at the time of oral argument that he was familiar with the rule to be applied to the testimony of experts, and so we see no necessity for reviewing those cases again.

Since this Court is sitting in admiralty in this case, it must apply the admiralty rules. In other words, if the case falls within the admiralty framework the libelant is entitled to recover. It is the rule in admiralty that if the gear is being used "in a customary and usual manner" and it breaks the only logical inference is that it would not break unless it was defective, i.e., unless it was unseaworthy. As was said in the *Petterson* case, *supra*:

"While being put to a proper use in a proper manner, the block broke causing the injuries complained of to *Petterson*. There was no proof as to the condition of the block prior to its use other than what may be implied from the accident.

The court below granted a decree for the Owner on the ground that it was not shown that the block belonged to or was a part of the gear of the *Susitna*. *Petterson's* argument that liability should be imposed even if the gear belonged to the Stevedoring Co. was rejected by the court on the ground that *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 1946 A.M.C. 698, did not go so far.

The Owner contends that as there was no proof of the unseaworthiness of the block, *Petterson* cannot recover. This contention is without merit. The Court below found that the block was used "in a customary and usual manner" and that it "was of a type ordinarily and customarily used and proper for the use to which it was being put upon the occasion in question". (R. 14-15.) In admiralty appeals, findings of fact based upon credibility of witnesses who testified in open court will not be set aside.

Crowley Launch & Tugboat Co. vs. Silmington Transp. Co., 1941 A.M.C. 449, 117 F. (2d) 651, 653 (9 Cir.). But an admiralty appeal is a trial de novo, Olsen vs. Alaska Packers Assn., 1940 A.M.C. 1443, 114 F. (2d) 364 (9 Cir.), and this court may make its own inferences from the facts as found where it does not upset the findings based upon the credibility of witnesses. If the block was being put to a proper use in a proper manner, as found by the district judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy.

In making this inference we do not reply upon the tort doctrine of *res ipsa loquitur*, although the result is similar. *Res ipsa loquitur* is a doctrine of causation usually applied in cases of negligence. Here we are dealing with a species of strict liability regardless of fault. *Seas Shipping Co. vs. Sieracki*, supra, 328 U.S. at 94, 1946 A.M.C. at 704. It is not necessary to show, as it is in negligence cases, that the shipowner had complete control of the instrumentality causing the injury, see *O'Mara v. Pennsylvania R. Co.*, 95 F. (2d) 762 (6 Cir.); or that the result would not have occurred unless someone were negligent, see *Pillars vs. R. J. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365. It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists. *Mahnich vs. Southern S.S. Co.*, 331 U.S. 96, 1944 A.M.C. 1."

Further, the *Petterson* case, supra, also holds that the doctrine of control does not exist and that the

ship owner is liable for unseaworthiness, even though it arises after control of the ship or that part which includes the unseaworthy condition has been surrendered to the stevedores. The Court should consider this rule in considering whether or not prior use of the wire by the stevedores that morning had caused it to be weakened. In other words, even though it had been weakened by prior use of the stevedores, nevertheless, this does not in any way absolve the shipowner from fault and responsibility. Thus, even though it might be considered as a transitory condition that fact does not absolve respondent from liability. (*Pacific Far East Lines, Inc. v. Williams*, (9th CA) decided May 23, 1956).

As was said in *Williams v. Lykes Bros. Steamship Co.*, 1955 A.M.C. 2045:

“Unseaworthiness of the vessel alone fixes liability on the vessel owner where that unseaworthiness is the proximate cause of the damage in suit. *Seas Shipping Co. vs. Sieracki*, 328 U.S. 85, 1946 A.M.C. 698. Where, as here, without apparent cause, a supporting member of the deck of a vessel falls over and injures a longshoreman working in the hold of the vessel, the vessel is unseaworthy and her owner is responsible in damages for the injury. *Mahnick vs. Southern Steamship Co.*, 321 U.S. 96, 1944 A.M.C. 1.”

Conclusion

This Court has once decided this case and we believe the decision to be accurate and as said by Judge Claude McCulloch at the conclusion of the

trial in the Potter case, *supra*, it is a case "within the modern framework of admiralty decisions".

Libelant sustained the burden not only as to unseaworthiness, but also as to negligence, both as to defective wire and because of inadequacy of the cleating for the rigging which latter contention of libelant was never at any time disputed in the testimony by respondent. Verily, this was done by respondent because it is undisputed that the cleating and placing of the padeyes was improper and inadequate.

At the trial, when the Court first decided the case, it allowed the libelant only \$5,000.00 in general damages. We request the Court to reconsider the allowance of the amount of general damages in that we believe it to be very inadequate. We wish to call to the attention of the Court in the decisions cited by libelant the damages allowed for various injuries. The writer urges upon this Court that it allow libelant \$25,000.00 in general damages. The Court will recall the testimony that libelant's injury is a serious one to a working man who must stand on his feet, climb or lift weights, and that his condition will not improve but will get worse as time goes by.

Respectfully submitted,

PETERSON & POZZI and
BERKELEY LENT,

/s/ By FRANK H. POZZI,
Attorneys for Libelant.

[Endorsed]: Filed January 8, 1957.

[Title of District Court and Cause.]

OPINION

Clark, D. J.

This is an action brought by libelant Titus against the SS Santorini, her engines, tackle and gear and her owners and the charterer. The vessel was lying in port at Coos Bay, Oregon, to load a cargo of lumber. Libelant was an employee of the Independent Stevedoring Company, an independent contractor, who had contracted to do the loading of the ship.

During the process of loading the ship, February 5, 1955, the preventer wire and rope guy for the starboard boom at the No. 2 hatch parted, allowing the load on the cargo hook to swing. The libelant, who was then acting as hatchtender, in order to avoid being struck by the cargo, ran across the deck, slipped and fell, causing his present injuries.

The libelant seeks to recover damages for his injuries on the grounds of the unseaworthiness of the vessel and the negligence of the respondent owners and operators.

Upon the completion of the trial of this case, the Court announced its verdict in favor of the libelant and asked for Findings and Judgment in accordance therewith. Thereafter, the Court withdrew its opinion and asked counsel to submit briefs on the questions of the vessel's unseaworthiness and the negligence of the owners, feeling that the Court should further deliberate those matters.

While the Court asked only for a transcript of

the Respondents' testimony, the Court has studied the complete record and all the evidence presented, together with brief presented by respective counsel.

There is no question but what an employee of the stevedoring company can recover from the ship and its owners, for injuries received as a proximate result of the vessel's unseaworthiness or the negligence of its owners and operators, *Seas Shipping Co. vs. Sieracki*, 328 U.S. 94. The existence of unseaworthiness and the issue of negligence are the only questions involved here.

The rule is that the burden is with the libellant to prove the allegations of its petition. The libellant here proceeded on the theory, apparently, that upon a showing that the gear was being used "in a customary and usual manner" and it breaks, the inference is that it would not break unless it was defective or unseaworthy, and relies upon the case of *Petterson vs. Alaska S.S. Co.*, (9th Cir.) 205 F. 2d. 478; 1953 A.M.C. 1405; affirmed 347 U.S. 396, 1954 A.M.C. 860. In the *Petterson* case a block, which was being used in the loading operation, broke. There was no proof as to the condition of the block prior to its use other than what may be implied from the accident itself.

In the present case the evidence is to the effect that the preventer wire which gave way was brand new. The preventer wire on the same boom with which we are here concerned had given way the day preceding this break and the evidence shows that the boom was rerigged with brand new unused wire of a hard European type. The metalurgi-

cal expert, called by respondent, as a finding in laboratory tests, testified that the parted wire was not defective. He was unable to find any wear, corrosion, brittleness or other defect in the wire, but concluded that the wire had broken because of tensile pull. The force exerted on it was greater than its breaking strength.

There is no great conflict in the evidence, although there appears to be some controversy over how far from the pad eye the wire broke, the contention being that if it broke within six inches of the pad eye the break would have been the result of a weakening effect caused by the bend at the pad eye. The evidence clearly shows the break occurred at least a foot or foot and a half above the pad eye.

There is some further contention that there was negligence because there was only one cleat forward of the pad eye whereas there should have been two; that every time the wire went around a cleat its strength was increased and so with more cleats this wire would have been stronger. The record shows that ships of this type have only one cleat, that was not unusual and the ship was rigged in the ordinary and customary manner where there is only one cleat forward of the pad eye.

The question here finally resolves itself into a determination of whether the libelant can recover for alleged injuries by showing that the gear was being used, and the loading was being done, in a usual and customary manner; a break occurred, and as a result the libelant was injured, in the face of

testimony presented by the respondent that the wire which broke was not defective—but that it was seaworthy.

In other words, will an inference that the vessel was unseaworthy arising from the fact that a preventer wire broke, prevail when there is an affirmative showing that there was no defect in the wire?

The Court is not concerned with the allegations of negligence as there was no negligence whatsoever shown in this case.

As has been stated the burden rests on the libelant to prove the allegations of unseaworthiness, and where there is nothing shown to the contrary, it may be presumed that was the case merely because the accident happened while the gear was being used in the usual and customary manner. However, here the presumption is overcome with evidence to the contrary, making it necessary that there be some further affirmative showing on the part of the libelant that the unseaworthiness alleged existed. There is no such showing here.

Witnesses for libelant testified that they didn't know why the wire and guy rope broke, but yet the break occurred. The load was not too heavy for the size of wire used, and the wire was new without defect. The record shows, further, that a strand of wire from the point at which the break occurred was taken by the libelant to a metallurgical expert for analysis as to cause of the break, and yet that wire was not produced and that expert witness did not appear on libelant's behalf. There was some suggestion that the break could have been

caused by tight lining—one winch pulling against the other until the force exerted was greater than the strength of the wire causing it to give way. It should be noted that this was only a suggestion; there is no evidence in the record that such was the case.

The Court in the Petterson case, *supra*, said that in cases of this type we deal with a species of strict liability regardless of fault. “It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists.”

The evidence does not support a finding of unseaworthiness.

To say the respondents were liable in a fact situation such as exists here would broaden the liability even beyond that of the Petterson case, *supra*.

Attorneys for Respondents may prepare Findings of Fact, Conclusions of Law and Judgment, submitting original to the Court and serving a copy on opposing counsel.

[Endorsed]: Filed January 8, 1957.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having come on for trial before me, the libelant appearing in person and by and through Frank H. Pozzi, of proctors, claimant and respondents appearing by and through Wood, Matthiessen, Wood & Tatum, Erskine Wood and

John R. Brooke of proctors, witnesses having been sworn and testified, exhibits having been admitted in evidence, arguments of proctors having been had, and the Court being fully advised in the premises, hereby makes its findings as follows:

Findings of Fact

I.

That libelant is a resident of the United States and of the District of Oregon within the jurisdiction of this court, and resides in the City of Coos Bay, Coos County, State of Oregon.

II.

That a general appearance has been made by respondents, Sigalas and Kulukundis, and this court has general jurisdiction over said company for the purposes of this cause. That said company was the owner and operator of the said SS Santorini at all times herein mentioned.

III.

That the respondent vessel, SS Santorini, was in the port of Coos Bay, Coos County, Oregon, and upon navigable waters of the United States and within the jurisdiction of this court at the time of service of process.

IV.

That on February 5, 1955, libelant was engaged as a longshoreman in the capacity of a winch driver aboard said vessel and at the time of the accident was acting as hatch tender, and his employer was a master stevedore, to-wit, Independent Stevedore Company, who was loading said vessel at the Coos

Bay Lumber Company Dock at Coos Bay, and at the time of the accident libelant was working as hatch tender at No. 2 Hatch aboard said vessel, which was a liberty type vessel.

V.

That libelant sustained an accident aboard said vessel at said Hatch No. 2 at approximately 12:15 p.m. on said date, when a defective preventer wire gave way, causing libelant to slip and fall in trying to get out of the way of the swinging gear, and causing him severe permanent personal injuries, and that his injuries were caused by the unseaworthiness of the vessel and the negligence of said respondent owners and operators.

VI.

That at the time and place of said accident, respondent company was negligent and said vessel was unseaworthy because the ship's gear and appurtenances and the preventer wire were defective, and said preventer wire was in use at the time and place of the accident.

VII.

That at the time and place of said accident said vessel was unseaworthy and respondent company was negligent in that there was no place to secure the preventer wire in any manner, other than it was secured, because there was an insufficient number of cleats located on the rail.

VIII.

That at the time and place of said accident said

respondent company was negligent in failing to provide libelant with a safe place to work.

IX.

I find that libelant has incurred doctor, hospital and medical expenses to date in the sum of \$402.50 as a proximate result of said accident.

X.

I find that at the time of the happening of said accident, libelant was earning in excess of \$100.00 per week, and as a proximate result of said accident has lost wages to the date of trial in the sum of \$2,050.00.

XI.

I find that as a proximate result of said unseaworthiness of said vessel and said negligence of said company, that while a load was on the cargo hook, the preventer wire gave way causing libelant to fall causing him severe nervous shock, physical pain and suffering, bruises and contusions to his leg, a severe tearing, twisting and wrenching of the tendons, ligaments, bones, soft tissue and muscles of his leg, crushing fractures of his leg, dislocated ankle, from all of which libelant was rendered sick, sore, nervous and distressed and has been caused to sustain severe permanent injuries, and that his ability to work and perform labor has been permanently impaired. I find that at the time of the happening of the accident libelant was a healthy, robust, physically able man of the age of 45 years with a life expectancy under the standard mortality

tables of 25.21 years, and was capable of engaging in strenuous physical labor.

XII.

I find that libelant, himself, was not negligent in any respect.

XIII.

That libelant elected to pursue a remedy against a third party pursuant to the provisions of the Longshoremen's and Harborworkers' Compensation Act and has filed with the United States Department of Labor, Bureau of Employees' Compensation, Notice of Election to Sue.

Based upon the foregoing Findings of Fact the Court makes the following:

Conclusions of Law

I.

That this court has jurisdiction of the cause and the subject matter and that the respondent Sigalas and Kulukundis has submitted itself to the jurisdiction of this court.

II.

That the injuries sustained by libelant in said accident of February 5, 1955, were caused solely by the negligence of said owners and operators of said vessel and the unseaworthiness of said vessel and its appurtenances.

III.

That libelant himself was not contributorily negligent.

IV.

That libelant is entitled to a decree awarding him special damages in the sum of \$2,452.50, and general damages in the sum of \$5,000.00, and recovery of his costs and disbursements incurred herein.

Dated this day of January, 1956.

.....
United States District Judge.

[Title of District Court and Cause.]

PROPOSED DECREE

This matter coming on regularly for hearing before the Honorable Chase A. Clark, Judge of the above entitled Court, testimony having been adduced by parties, arguments having been made, the Court having made its findings of fact and conclusions of law, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed that libelant, Glen Titus, have of and recover judgment against respondents, the SS Santorini, her engines, tackle and gear, and all persons claiming any interest therein, and Sigalas and Kulukundis, in the sum of \$5,000.00 general damages, and the further sum of \$2,452.50 special damages, with interest at the rate of six (6%) per cent per annum from the date of this decree until fully paid, and

It Is Further Ordered, Adjudged and Decreed that libelant have of and recover judgment against respondents for his costs and disbursements taxed in the sum of \$., and

It Is Further Ordered, and Decreed that upon payment of the Decree and costs and obligations taxed herein, that respondents, the SS Santorini, her engines, tackle and gear, and all persons claiming any interest therein, and Sigalas and Kulukundis, and their sureties, shall be relieved from all further obligations from such stipulations as they may have filed in this cause.

Dated this day of January, 1956.

.....

United States District Judge.

[Title of District Court and Cause.]

OBJECTIONS AND AMENDMENTS TO RESPONDENTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now libelant and objects to certain of claimant's and respondents' Proposed Findings of Fact and Conclusions of Law, and requests amendments thereto as follows:

I.

Objects to that portion of paragraph VI of the Proposed Findings of Fact that states that "The preventer wire that parted at the time and place of libelant's injury was brand new and without defect," and that "There was no wear, corrosion, brittleness or other condition which would render the wire unseaworthy," and that "It was of proper size and strength for the work for which it was being used".

II.

Objects to that portion of paragraph VIII of the Proposed Findings of Fact which states that the "tension and strain * * * was equalized".

III.

Objects to all of paragraph IX of the Proposed Findings of Fact, and it should be amended by reciting therein that the angle of the preventer wire at the pad eye caused a break in the preventer wire; that there was an insufficient number of cleats and pad eyes, and that the vessel was unseaworthy and the respondents and claimant were negligent.

IV.

Objects to all of paragraph XI of the Proposed Findings of Fact, and they should be amended to read: that the preventer wire was unseaworthy, defective, and that respondents and claimant were negligent.

V.

Objects to all of paragraph XII of the Proposed Findings of Fact and moves to amend it by reciting that the rope-guy parted because of its stretch after the preventer wire broke, which caused it to snap.

VI.

Objects to all of paragraph XIII of the Proposed Findings of Fact and moves to amend it by reciting that libelant sustained severe personal injuries proximately caused by the negligence of respondents and claimant and by the unseaworthiness of the vessel.

VII.

Objects to paragraph XIV of the Proposed Findings of Fact and the same should recite that libelant sustained general damages in the sum of \$15,000.00 and special damages in the sum of \$2,452.50.

VIII.

Objects to all of paragraphs II, III, IV and V of respondents' and claimant's Proposed Conclusions of Law.

PETERSON, POZZI & LENT,
/s/ By F. H. POZZI,
Attorneys for Libelant.

[Endorsed]: Filed January 16, 1957.

United States District Court
District of Idaho

Chase A. Clark, Chief Judge
Chambers—Boise, Idaho

1 March 1957

Mr. R. DeMott, Clerk
United States District Court
United States Post Office & Courthouse
Portland, Oregon

Re: Titus vs. SS Santorini et al. Civil Number
7957.

Dear Mr. DeMott:

Enclosed herewith for filing are Findings of Fact and Conclusions of Law and Decree in the above-entitled case which Judge Clark has signed. I am also sending you the original of the objections

filed by the Libelant. The Court felt that by signing the Findings and Conclusions and Decree he in effect overrules the objections, so there is no specific order overruling the objections. Should such an order be the practice in your District, kindly advise and we will forward it to you.

Best wishes to your staff.

Sincerely,

/s/ Ina Mae Wheeler,

Law Clerk.

Cc. John R. Brooke

Frank H. Pozzi

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having come on for trial before me, the libelant appearing in person and by and through Frank H. Pozzi, of proctors, claimant and respondents appearing by and through Wood, Matthiessen, Wood & Tatum, Erskine B. Wood and John R. Brooke of proctors, witnesses having been sworn and testified, exhibits having been admitted in evidence, arguments of proctors having been had, and written briefs submitted, and the Court being fully advised in the premises, hereby makes its findings of fact and conclusions of law as follows:

Findings of Fact

I.

Libelant is a resident of the United States and

of the District of Oregon, within the jurisdiction of this Court, and resides in the City of Coos Bay, Coos County, State of Oregon.

II.

A general appearance has been made by claimant, Sigalas and Kulukundis, and this Court has jurisdiction over said company for the purposes of this suit. Said company was the owner and operator of the said SS Santorini at all times herein mentioned. Respondents Madam Cadio G. Sigalas, et al., and Pacific Atlantic Steamship Company did not have or claim any interest in the SS Santorini at the time and place of libelant's accident, and the record does not show that they had anything to do with the operation of said vessel.

III.

The respondent vessel, SS Santorini, is a Liberty type ocean cargo vessel, and was in the Port of Coos Bay, Coos County, Oregon, and upon navigable waters of the United States and within the jurisdiction of this Court at the time of service of process.

IV.

On February 5, 1955, libelant was engaged as a longshoreman in the capacity of a winch driver aboard said vessel, and at the time of the accident was acting as hatch tender at No. 2 hatch of said vessel, and his employer was an independent contracting master stevedore, to-wit: Independent Stevedore Company, which was loading said vessel at

the Coos Bay Lumber Company Dock at Coos Bay, Oregon.

V.

Libelant sustained an injury aboard said vessel at the No. 2 hatch at approximately 12:15 p.m. on said date, when the preventer wire and rope guy for the forward starboard boom for that hatch parted. This caused the boom and the load of lumber the boom was lifting to swing, and libelant, in order to avoid being struck by the load, ran across the deck, slipped and fell, doing injury to his right ankle and leg.

VI.

The preventer wire that parted at the time and place of libelant's injury was brand new and without defect. There was no wear, corrosion, brittleness or other condition which would render the wire unseaworthy. It was of proper size and strength for the work for which it was being used.

VII.

The rope guy that parted at the time and place of libelant's injury was brand new and without defect. There was no wear, rot, tear or other condition which would render the rope guy unseaworthy. It was of proper size and strength for the work for which it was being used.

VIII.

Prior to the accident, the preventer wire and rope guy had been rigged by the longshoremen, employees of the said master stevedore, so the tension or strain on each was equalized. This is the usual

and regular practice when loading or discharging cargo on Liberty type ships.

IX.

The preventer wire that parted had been secured at the ship's rail by being passed through a pad eye and then forward to a cleat. The break in the preventer wire occurred at least a foot to a foot and a half above this pad eye. The break occurred at a point well beyond any possible weakening effect caused by the angle of the preventer wire at the pad eye. The angle at the pad eye did not cause or contribute to the breaking.

X.

Libelant had a strand from the part of the preventer wire submitted to a metallurgist prior to the trial, but did not offer this strand of wire into evidence, nor did he call the metallurgist to testify.

XI.

The preventer wire and rope guy were seaworthy and free of any defect. Respondents and claimant were not negligent.

XII.

The preventer wire parted because of a tensile pull, that is, the force exerted on the preventer wire was greater than its breaking strength. The rope guy also parted because the force exerted on it was greater than its breaking strength.

XIII.

Libelant's injuries were not proximately caused by any negligence on the part of respondents or

claimant or by any unseaworthiness of the SS Santorini.

XIV.

Although I have found for the respondents and claimant and against the libelant, I am fixing his total damages in the amount of \$7,452.50, of which \$2,050.00 is lost wages, \$402.50 are hospital and medical expenses, and the remaining \$5,000.00 are libelant's general damages.

Based upon the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

I.

This Court has jurisdiction of the cause and of the subject matter, and parties.

II.

There was no negligence on the part of the respondents or claimant, its vessel, officers or crew, and the SS Santorini and its appurtenances were not unseaworthy.

III.

Libelant's accident of February 5, 1955, and resulting injuries were not caused by any negligence of respondents or claimant or unseaworthiness of the SS Santorini and its appurtenances.

IV.

Libelant is not entitled to recover his damages from respondents or claimant.

V.

Respondents and claimant are entitled to a decree

in their favor and against libelant, dismissing the libel herein with prejudice, exonerating and holding for naught claimant's stipulation to abide by the decree and for costs, and discharging the surety thereon, and awarding respondents and claimant recovery of their costs and disbursements incurred herein.

Dated: March 1st, 1957.

/s/ CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed March 4, 1957.

In the United States District Court
for the District of Oregon

Civil No. 7957

GLEN TITUS,

Libelant,

vs.

SS SANTORINI, her engines, tackle and gear, and
all persons claiming any interest therein, and
MADAM CADIO G. SIGALAS, et al., owners,
and PACIFIC ATLANTIC STEAMSHIP
COMPANY, charterers, Respondents.

SIGALAS AND KULUKUNDIS, Claimant.

DECREE

This suit coming on regularly for trial before the Honorable Chase A. Clark, Judge of the above entitled Court, libelant appearing by Frank H. Pozzi

of his proctors, and respondents and claimant appearing by Erskine B. Wood and John R. Brooke of their proctors, the pre-trial order having been presented and approved by proctors of the parties and signed by the Court, and the parties having proceeded to trial, and the Court having heard and considered the evidence, statements and briefs of the proctors, and having rendered its written opinion and having made separate Findings of Fact and Conclusions of Law, and being advised in the premises, now therefore,

It Is Hereby Considered, Ordered and Decreed that libelant Glen Titus take nothing from and against respondents, SS Santorini, her engines, tackle and gear, and all persons claiming any interest therein, and Madam Cadio G. Sigalas, et al., owners, and Pacific Atlantic Steamship Company, charterer, and claimant, Sigalas and Kulukundis, and the libel herein be and it hereby is dismissed with prejudice; and it is further

Considered, Ordered and Decreed that said respondents and claimant have and recover from and against said libelant their costs and disbursements taxed in the sum of \$425.42, and it is further

Considered, Ordered and Decreed that claimant Sigalas and Kulukundis' stipulation to abide by and pay the decree and for costs, filed herein, is exonerated and held for naught, and said claimant and its surety are hereby relieved from all further obligations on said stipulation, and upon libelant's payment to respondents and claimant of the amount of their costs and disbursements taxed herein, libel-

ant's cost bond filed herein will be exonerated and the surety thereon discharged.

Dated this 1st day of March, 1957.

/s/ CHASE A. CLARK,

U. S. District Judge Sitting in
Admiralty.

[Endorsed]: Filed March 4, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the libelant, Glen Titus, appeals to the United States Court of Appeals for the Ninth Circuit from the final decree and the whole thereof entered herein on the 1st day of March, 1957, by the terms of which the libel herein was dismissed and libelant was denied recovery of damages from respondents, SS Santorini, her engines, tackle and gear, and all persons claiming any interest therein, and Madam Cadio G. Sigalas, et al., owners, and Pacific Atlantic Steamship Company, charterer.

Dated this 10th day of April, 1957.

PETERSON, POZZI & LENT,

/s/ RALPH N. DUNCANSON,

Of Proctors for Libelant.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 23, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge, that we, our administrators, successors and assigns are bound to pay to the respondent and claimant the full and just sum of Two Hundred Fifty and No/100 (\$250.00) Dollars.

The Condition of This Bond Is Such, That,

Whereas, the libelant, Glen Titus, has appealed to the Circuit Court of Appeals for the Ninth District by notice of appeal filed April 10th, 1957, if the libelant shall pay all costs adjusted against him if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment be modified, then this bond is to be void, but if the libelant fails to perform this condition payment of the amount of this bond shall be due forthwith.

Signed, sealed and dated this 13th day of May, 1957.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
/s/ By CLARENCE D. PORTER,
Attorney in Fact.

Countersigned:

/s/ CLARENCE D. PORTER,
Resident Agent.

[Endorsed]: Filed May 21, 1957.

[Title of District Court and Cause.]

ORDER

Based on the motion of libelant on file herein,
It Is Hereby Ordered that libelant be, and he
hereby is, granted 40 days from the date of this
order in which to docket the above entitled cause
in the United States Court of Appeals for the
Ninth Circuit.

Dated this 15th day of May, 1957.

/s/ CHASE A. CLARK,
United States District Judge.

[Endorsed]: Filed May 21, 1957.

[Title of District Court and Cause.]

ORDER

Upon the motion of Libelant Appellant and for
cause shown, the Clerk of this Court is hereby

Ordered to mail with the record and the tran-
script of appeal all of the exhibits received in evi-
dence in the above entitled cause to the Clerk of
the United States Court of Appeals for the Ninth
Circuit.

And It Is So Ordered.

Dated this 10th day of June, 1957.

/s/ CHASE A. CLARK,
United States District Judge.

[Endorsed]: Filed June 12, 1957.

[Title of District Court and Cause.]

DOCKET ENTRIES

1955:

Feb. 9—Filed libel in rem and personam with foreign attachment.

9—Filed stipulation for costs.

9—Issued monition with foreign attachment—to marshal.

9—Filed warrant of arrest and monition—to marshal.

11—Filed claim of vessel by owners.

11—Filed general appearance of Sigalas and Kulukundis.

11—Filed stipulation to abide decree and for costs.

14—Filed warrant of arrest and monition with marshal's return.

24—Filed deposition of John Kyriocas.

Mar. 28—Filed monition with marshal's return—unserved.

Apr. 6—Filed motion of respondent and claimant to increase libellant's stipulation for costs.

6—Filed motion of respondent and claimant to produce for inspection.

6—Filed answer of respondent and claimant.

18—Entered order increasing libellant's stipulation for costs to \$500.00 and order allowing respondent's motion to produce and for inspection. (S)

21—Filed order increasing amount of libellant's stipulation.

1955:

Apr. 21—Filed order for production and inspection.

26—Filed stipulation for costs.

May 31—Entered order setting for pretrial conference on June 20, 1955. (S)

June 20—Entered order setting for pretrial conference on June 27, and for trial on August 14. (S)

27—Lodged pretrial order and one copy.

27—Entered order striking from trial docket of August 14. (S)

21—Filed justification of stipulator.

28—Filed deposition of Glen Titus.

Nov. 25—Entered order setting for trial on January 16, 1956. (S)

1956:

Jan. 10—Issued 2 subpoenas, 7 copies—to plaintiff's attorneys.

16—Filed and entered pretrial order. (Clark)

16—Record of trial. (Clark)

17—Record of trial and opinion. (Clark)

17—Filed exhibits. Libelant's 3a to d, f to i, 4, 5, 7a to g, 8 and 9, Respondents' 3a, b, c and d, 4a, 7 and 12.

Feb. 1—Filed objections and amendments to libelant's proposed findings of fact, etc., by SS Santorini and claimant.

6—Record of withdrawal of opinion, order allowing libelant 10 days after receipt of transcript to file brief, respondent 10 days thereafter for briefs and libelant 5 days for reply brief. (Clark)

1957:

- Jan. 8—Filed opinion (decision for respondent.)
(Clark)
8—Filed libelant's brief.
8—Filed respondents' brief.
16—Filed objection and amendments to respondents' proposed findings of fact and conclusions of law.
- Mar. 4—Entered order overruling objections.
(Clark)
4—Filed and entered Findings of Fact and Conclusions of Law (dated 3/1/57).
(Clark)
4—Filed and entered Decree (dated 3/1/57).
(Clark)
7—Filed cost bill.
11—Costs taxed at \$425.42.
- Apr. 23—Filed notice of appeal.
23—Filed petition for appeal and order allowing appeal. (Clark)
23—Filed stipulation for costs.
- May 21—Filed libelant's motion for order to withdraw Stipulation for costs and substitute bond.
21—Filed and entered order to withdraw Stipulation for cost bond and substitute bond for costs. (Clark)
21—Filed libelant's motion for extension of time to docket appeal.
21—Filed and entered order extending time 40 days from May 15, 1957 to docket appeal. (Clark)

1957:

May 21—Filed designation of record on appeal.

21—Filed bond for costs on appeal.

23—Filed and entered order extending time for appeal. (Clark)

23—Filed and entered order substituting bond. (Clark)

June 10—Filed transcript of proceedings.

12—Filed motion to forward exhibits to Court of Appeals. (Clark)

12—Filed order to forward exhibits to Court of Appeals.

12—Filed supplemental designation of record by claimant.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,

District of Oregon—ss:

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Libel in rem and in personam with foreign attachment; Answer; Order dated April 18, 1955; Pre-trial order; Order allowing time to file briefs; Record of trial on January 17, 1956; Libelant's brief; Opinion of Judge Clark; Proposed findings of fact and conclusions of law (not filed) Proposed decree (not filed); Objections and amendments to respondents' proposed findings of fact and conclusions of law; Letter dated March 1, 1957; Findings of fact and conclu-

sions of law; Decree; Notice of appeal; Bond for costs on appeal; Order extending time to docket appeal; Designation of record on appeal; Order to forward exhibits to Court of Appeals; Supplemental designation of record by claimant and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7957, in which Glen Titus is the libelant and appellant and SS Santorini, her engines, tackle and gear, and all persons claiming any interest therein, and Madam Cadio G. Sigalas, et al, owners, and Pacific Atlantic Steamship Company are the respondents and appellees; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and the claimant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of testimony filed in this office in this cause. The exhibits will be forwarded by express by the attorneys for the appellants.

I further certify that the cost of filing the notice of appeal, \$5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 14th day of June, 1957.

[Seal] R. DE MOTT,
 Clerk,

/s/ By THORA LUND,
 Deputy.

In the District Court of the United States
For the District of Oregon

Civil No. 7957

GLEN TITUS,

Libelant,

vs.

SS SANTORINI, her engines, tackle and gear, and
all persons claiming any interest therein, and
MADAM CADIO G. SIGALAS, et al, owners
and PACIFIC ATLANTIC STEAMSHIP
COMPANY, charterer, Respondents,

SIGALAS and KULUKUNDIS, Claimant.

TRANSCRIPT OF PROCEEDINGS

This matter was heard before the Honorable
Chase A. Clark, sitting without a jury, at Portland,
Oregon on January 16, 1956.

Appearances: Peterson and Pozzi, Frank H.
Pozzi, Esq., 901 Loyalty Bldg., Portland 4, Oregon,
Proctors for Libelant. Wood, Matthiessen, Wood &
Tatum, Erskine B. Wood, Esq., John R. Brooke,
Esq., 1310 Yeon Bldg., Portland 4, Oregon, Proctors
for Respondent and Claimant. [1]*

January 16, 1956—10 o'clock A.M.

(By agreement of counsel Dr. John W. Gar-

* Page numbers appearing at bottom of page of Reporter's
Original Transcript of Record.

ner, a witness for the Libelant was called, sworn and testified before the opening statement).

JOHN W. GARNER

called as a witness on behalf of the Plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Pozzi): Will you state your name?

A. John W. Garner.

Q. Are you a duly licensed, practicing physician and surgeon in the State of Oregon?

A. Yes sir.

Q. Where do you maintain an office?

A. 510 Hill Building, Coos Bay.

Q. How long have you been located in Coos Bay? A. Four years.

Q. What is your background in the practice Doctor?

A. I graduated from the Medical school, University of Iowa in 1943, served three years in the army and during the ensuing four years——

The Court: ——Can't you gentlemen admit the qualifications of this Doctor?

Mr. Brooke: We will admit the Doctor's qualifications.

Q. When did you begin practicing in Coos Bay?

A. I began practicing in Coos Bay in 1951.

Q. And do you belong to any medical societies?

A. Yes sir.

Q. The Coos County Medical Association, The

(Testimony of John W. Garner.)

American Medical Association. Fellow of the American College of surgeons.

Q. Do you limit your practice to any particular type of medicine? A. Surgery.

Q. Did Glen Titus, the Libelant become a patient of yours in February,—about February 5, 1955? A. Yes sir.

Q. As a result of what?

A. As a result of an injury to the right ankle.

Mr. Pozzi: I will offer in evidence at this time, pre-trial exhibit 1, being the Coos Bay Hospital record, the Plaintiff or Libelant's hospital record.

The Court: If there is no objection, it may be admitted.

Mr. Pozzi: I will also offer in evidence libelant's exhibits 3a to 3i inclusive which are x-rays. These are pre-trial exhibits.

The Court: They may be admitted.

Q. Where was the patient when you first saw him?

A. In the emergency room at the hospital.

Q. Did you make a physical examination at that time? A. I did. [4]

Q. What did you find as a result of your physical examination?

A. The general physical examination was within normal limits, the positive findings were confined to the right ankle.

Q. What were the positive findings so far as physical findings were concerned?

(Testimony of John W. Garner.)

A. A backward and outward dislocation at the ankle joint.

Q. Was the patient in pain at that time?

A. Yes, he was.

Q. Was he in a certain amount of shock?

A. No, he was not in shock.

Q. You feel that he was out of that stage?

A. Yes.

Q. Do you recall what time it was when you first saw him at the hospital?

A. I would have to refer to the hospital record. It was around 12:30.

Q. Did you order x-rays taken?

A. Yes sir.

Q. What did the x-ray show, Doctor?

A. Showed a posterior fracture and dislocation of the ankle?

Q. A fracture and also a dislocation?

A. Yes sir.

Q. Where was the fracture location?

A. The fibula was fractured about three centimeters—excuse me, six centimeters above its lower end. The posterior margin of the Tibia was fractured. [5]

Q. The posterior margin is that the posterior Malleolus? A. Yes sir.

Q. Was the fracture of the fibula in the distal end of the shaft? A. That's correct.

Q. Was there any displacement on that fracture?

(Testimony of John W. Garner.)

A. Yes, the fibula was displaced posteriorly as was the posterior malleolus.

Q. Now, Doctor will you step down to the view box. We will hand you exhibits 3a to 3i and I first ask you to select from those x-rays the original x-rays, show them and refer to them by number.

A. The first one I would like to show is pre-trial exhibit 3c. This demonstrates the shaft of long bone of the leg but does not show too well the actual fracture. The next one is pre-trial 3b. This shows the posterior dislocation of the ankle. This bone is called the Talus and normally articulates with this lower surface of the tibia. This bone (indicating) pushed posteriorly and as it goes past it has taken off fragments of this posterior tibia called the posterior malleolus.

Q. This is an original x-ray? A. Yes.

Q. Do you also have one that shows the fracture of the fibula?

A. Yes, that can be seen both here and here (indicating).

Q. Does that show the fracture?

A. This distal fracture is displaced posteriorly.

Q. Also does that show and can you show us with the pointer on the right of 3b where the ankle should be,—how the joint should have been if it were normal? A. Well, I am sorry—

Q. —Doctor, do you want to show it by another picture?

A. It might be easier. This is an interior-

(Testimony of John W. Garner.)

posterior view through the leg. This way it shows the ankle has been rotated outwardly and then pre-trial exhibit 3e I believe it is, shows the ankle after reduction of the fracture and dislocation and the normal relationship of the talus and tibia has been restored, and the posterior margin of the tibia has been brought in normal relation with the main portion of the bone and the fracture of the tibia has been reduced.

Q. You got a good alignment in that reduction?

A. Yes.

Q. Continue Doctor?

A. This is pre-trial exhibit 3f. Again this is an anterior-posterior view showing the normal relationship restored in that ankle joint, the ankle mortise has been restored and this articulation here (indicating) the talus here and the tibia and fibula.

Q. Now, Doctor, go through the others please.

A. The next film we have is exhibit 3g. It was taken on February 22, 1955, showing the normal relationship in the ankle mortise. We have an oblique view. We got a reduction of this fracture, that was the small posterior [7] margin,—the posterior Malleolus slipped by several centimeters.

Q. Did that stay in that position?

A. Yes sir.

Q. This man developed dermatitis or skin infection in that leg, did he Doctor?

A. Yes sir.

Q. And was it necessary to have the cast removed from it?

A. Yes sir.

(Testimony of John W. Garner.)

Q. Do you recall when that was,—strike that please,—Referring to the records Doctor, can you tell us first,—I believe this man was in the hospital until February 11? A. Yes sir.

Q. When did you care for him?

A. All that time.

Q. Did you care for him in the hospital?

A. Yes sir.

Q. Did you apply a cast on him?

A. Yes sir.

Q. What kind of cast did you apply?

A. A short leg cast of plaster of paris.

Q. How long did he wear that?

A. The first cast he wore until the date of discharge and then it was changed, a new cast was put on and that cast was changed. The second was on the 22nd of February?

Q. That is when this 3f was taken?

A. Yes. [8]

Q. What was the reason for changing the cast on the 22nd?

A. He was having a great deal of itching under the cast. There was serious drainage from the upper part of the cast.

Q. When you took the cast off what did you find? A. Dermatitis.

Q. Did you give some treatment or did you refer him to a Doctor Stephenson? A. Yes sir.

Q. Doctor Stephenson is now dead, is that correct? A. Yes sir.

(Testimony of John W. Garner.)

Q. Did you reapply the cast after you took it off on the 22nd?

A. Yes, we reapplied the cast, it was necessary in order,—well, we reapplied the cast, yes.

Q. You were going to say it was necessary to do something?

A. Three weeks later it was necessary to remove that cast and just have a plaster shell that he could take off and put back on himself.

Q. As to the dermatitis did that cause any pigmentation or discoloration of the skin?

A. Yes sir.

Q. And he has that? A. Yes sir.

Q. Is that permanent, this discoloration?

A. I would think it would be.

Q. How long did you treat him and see him continuously? [9]

A. To the present time.

Q. When did you last see him?

A. January 10, 1956.

Q. Did you have any x-ray taken on that day?

A. Yes sir.

Q. Could you step down and show us the x-rays and state what they are?

A. These are 3f and 3g. These films show a healing of the fracture.

Q. Which is which?

A. This is 3g and this is 3f, (indicating)

Q. Concerning either of the fractures, what do they show?

(Testimony of John W. Garner.)

A. They still show the elevation of the posterior tibial margin.

Q. That was on 3f and 3g which you just had there? A. Yes sir.

Q. Do you see any traumatic arthritis in those x-rays? A. No sir.

Q. Is it reasonable and probable that this man will develop traumatic arthritis?

A. I would expect him to.

Q. After about what length of time, with this type of injury, would you expect it to start showing?

A. That is extremely variable but I would expect some to be visible perhaps in three years.

Q. When there was this dislocation and fracture was there soft tissue damage to this man? [10]

A. Yes.

Q. When there is soft tissue damage does scar tissue occur? A. Yes.

Q. You cannot discern that by x-ray?

A. No.

Q. Does this man have a limitation of motion of the ankle? A. Yes, some.

Q. Is it reasonable and probable that this man will continue to permanently suffer some discomfort as a result of the injury he sustained in February 1955? A. Yes sir.

Q. It is reasonable and probable that this man—

Mr. Brooke: That is leading, many of these questions have been.

(Testimony of John W. Garner.)

The Court: Yes it is leading, however you didn't finish the question. Go ahead, but don't lead the witness.

Q. Do you have an opinion, Doctor, as to whether or not it is reasonable and probable that this man's ability to work, to perform manual labor is permanently impaired?

A. I do have an opinion and it is reasonable and probable that his ability to work will be permanently impaired.

Q. This limitation of motion he has, is that permanent? A. It is permanent.

Q. As I understand it, you treated this man until June when you stated that he could start back to work? [11] A. Yes.

Q. And then you saw him again in January of this year? A. Yes sir.

Q. Doctor, what is the reasonable charge for your services rendered?

The Court: I wonder if you gentlemen cannot get together on the amount of these bills, the Doctor, Hospital bills and so forth?

Mr. Brooke: If counsel will present the bills to me I think we can agree on the reasonableness of them.

Th Court: I think you can stipulate the amount in the record and save some time.

Mr. Pozzi: It is stipulated between counsel that the bills presented are as follows: Hospital \$172.00; Doctor John Garner \$200.00; Miles Funeral Home,

(Testimony of John W. Garner.)

ambulance \$6.50; x-rays \$15.00; Doctor Stephenson consultation on dermatitis \$8.00.

While counsel looks those over I will ask another question if I may.

The Court: Yes, go ahead.

Q. Did Mr. Titus have to go back to the hospital after his original discharge?

A. Yes, his casts were changed at the hospital.

Mr. Brooke: The amounts of the bills are so stipulated. [12]

Mr. Pozzi: The total is \$402.50. You may inquire.

Cross Examination

Q. (By Mr. Brooke): Did you discharge the man back to work in June Doctor? A. Yes.

Q. Was that to regular longshore work?

A. Yes.

Q. This limitation of motion that you found, did you manipulate both of his feet to see the difference? A. Yes.

Q. Did you do that in January?

A. Did it several times, in May—May 23, 1955, again June 6, 1955 and January 10, 1956.

Q. Isn't it true that the limitation of motion you found was at the end of the arcs?

A. That is correct.

Q. And it is not much limitation?

A. That is correct.

Mr. Pozzi: We object to the use of the word much,—we object to the form of that question.

(Testimony of John W. Garner.)

The Court: He may answer,—perhaps he has.

A. It is not a great limitation.

Q. Now, Doctor, you talked about some arthritis that may develop? A. Yes sir. [13]

Q. Could that be caused, or be the general arthritis that comes on later in life, that comes with age or how do you associate it with the injury?

A. What was the last part of the question.

Q. How do you associate it with the injury?

A. By past experience with similar injuries to other individuals,—injuries to weight bearing joints.

Q. Would subsequent injuries precipitate arthritis?

A. I am not sure that I correctly understand that question.

Q. Well Doctor, with just normal activity in a man, as he reaches later age he is going to develop certain type of arthritis, is he not?

A. That is correct.

Q. And that may be in the ankle joint or other parts of the body? A. That is correct.

Q. As I understand it, Doctor, there has been a good alignment of the fractures, they have been reduced and come into good alignment?

A. That's right.

Mr. Brooke: That is all.

Redirect Examination

Q. (By Mr. Pozzi): I don't want to get off on this Doctor. My question was concerning traumatic

(Testimony of John W. Garner.)

arthritis, will you explain what you mean by traumatic arthritis? [14]

A. Where a weight bearing joint has been disrupted and the soft tissue and the ligamentous structure has been torn and damaged and there is a healing and scar tissue, and where the cartilage lining has been damaged and there is a blood supply damage,—in that type of injury we expect earlier degeneration of the joint cartilage and we might expect in the individual what is called traumatic arthritis. From clinical and X-ray findings it closely resembles arthritis that occurs with aging process.

Q. What is your charge for coming up from Coos Bay and being out of your office a full day?

Mr. Brooke: I object to that it is not alleged as an item of damage.

The Court: That's right.

Mr. Pozzi: That's all.

Mr. Brooke: That's all.

The Court: You may make your opening statement at this time.

(Opening Statement by Mr. Pozzi.)

The Court: We will recess at this time until two o'clock this afternoon.

January 16, 1957—2 o'clock P.M.

NICK CHAVIOS

Called as a witness by the Libelant, after being first duly sworn testifies as follows:

Direct Examination [15]

Q. (By Mr. Pozzi): State your name please?

A. Nick Chavios.

Q. Where do you live?

A. Portland, Oregon.

Q. And what is your occupation?

A. I am a law clerk.

Q. By whom are you employed?

A. Peterson and Pozzi, attorneys.

Q. How long have you been so employed?

A. About five and a half years.

Q. In that capacity as a law clerk did you have occasion to be sent by me to Coos Bay to investigate an accident where the Libelant was hurt?

A. Yes, sir.

Q. Was that about February 5 or 6, 1955?

A. On the 6th of February I went to Coos Bay.

Q. Did you take any still pictures while you were there? A. Yes, I did.

Q. Are these the still pictures, those marked for identification in the number seven series?

A. Yes, those are some of the pictures I took?

Q. Submitting to you 7c and 7d Mr. Chavios, what do those pictures show?

A. These are close up views of the end of a six strand wire that the mate of the vessel and the boat-

(Testimony of Nick Chavios.)

swain of the vessel stated were the preventer wire that broke. [16]

Mr. Brooke: Your Honor, this is hearsay and we object to it and ask that it be stricken from the record.

The Court: You may just testify to what the pictures show.

A. These are the pictures of a wire shown to me by the crew of the vessel, which I took on board the SS Santorini, on the 7th day of February, 1955?

Q. Mr. Chavios did you talk to the mate of the vessel before you took those two pictures?

A. I did.

Q. Did he direct you to anyone else on the vessel? A. He did.

Q. To whom did you then talk to that was a member of the crew of the vessel?

A. The Boatswain.

Q. Did the Boatswain, in your presence, give any orders to the crew members?

A. Yes, he did.

Q. What was the order that he gave?

Mr. Brooke: Object to your Honor, again it is hearsay.

The Court: I don't know what position this man had with this Company.

Mr. Pozzi: He is no position with the Company, your Honor, the boatswain is a member of the crew, [17] he is not an officer of the ship, he is sort of foreman of the seamen. I will rephrase the question if I may.

(Testimony of Nick Chavios.)

The Court: Yes, you go right ahead.

Q. I will ask another question. What did you say to the mate when you saw him before he directed you to the boatswain of the ship?

A. The mate was ordered by the Master of the vessel to show me the,—to get the wire to me, and I asked the mate where it was.

Q. Then you talked to the master?

A. The master was the first officer that I talked to about the wire.

Q. What did you say to the Master and what did he say to you?

A. I asked the Master if we could inspect the wire that had broken on the date of the accident and the Master said “yes” that we could and directed the Mate to show it to me.

Mr. Brooke: Just a moment, your Honor, this is purely hearsay and we ask that it be stricken.

The Court: This seems to be the Master of the ship.

Mr. Brooke: If it is an admission against interest then perhaps there is some logic——

The Court: I don't know as it is an admission against interest, it is a statement made by the Master. I will permit this testimony subject to your [18] objection. This being a court trial I will permit this to go in, as I say, subject to your objection and I will consider it at the time of final decision.

Q. You have stated that the Master directed

(Testimony of Nick Chavios.)

the mate to get the wire for you, then what did he do,—what did the Mate do?

A. The Mate, in my presence, called to the Boatswain, who was working, at that time, at the forward end of the vessel with a crew of men, coiling some wire or some rope up there, and directed the Boatswain with the seamen that were with him, there were two or three seamen with him,—to take me to where the wire was stored in the fantail of the ship and to show it to me. The Mate came along with us and the Boatswain directed the seamen to go into the house there, apparently the wire was there. They brought this long strand of wire out and we looked at it. I then turned to the Mate and asked him if I could have a piece of the wire and he said “yes.” I took some photographs first,—I took these two photographs before cutting any of the wire and then we cut one of the strands, I believe,—one or two of the strands off of the end that they showed us had broken and then also a strand off the other end of this piece of wire which had not broken.

Q. Who did the actual cutting of the wire?

A. Members of the crew of the vessel.

Mr. Brooke: Your Honor, I understand that I have an objection to all of this type of testimony.

The Court: Yes, that's right. If after I consider these objections I feel that they are well taken I will not consider the evidence.

Q. Besides the still photographs did you also take some moving pictures? A. I did.

(Testimony of Nick Chavios.)

Mr. Pozzi: Your Honor, I have here a box the film was in, we have already set it up here. I would like to have the box marked and after we get through we can put the film in the box. This will be marked as 8e. I would like to ask another question.

The Court: Go ahead.

Q. Counsel for the respondent has here some wire in a box, have you looked at it?

A. Yes, I have.

Q. Does that appear to be the same wire you have, or the same wire that the strands were cut from?

A. It appears to be the same wire, yes, sir, some of it does.

Q. And you can see the place actually where it was cut?

A. Yes.

Mr. Pozzi: May this be marked as exhibit 8.

The Court: Yes, it may.

Mr. Pozzi: Now, your Honor, to facilitate the testimony, I will ask this man a few more questions and then I would like to show this film, have a sort of "dry run" for counsel and myself and to the Court. This is to facilitate [20] the testimony of the other witnesses.

Q. What kind of camera did you use to take the moving pictures with?

A. It is an eight millimeter Keystone camera, I think it is a model K8. It is one of the older models of cameras put out by the Keystone people.

(Testimony of Nick Chavios.)

Q. And at what speed did you take the pictures?

A. Sixteen frames per second is the speed which I used on it.

Q. Is that what is known as the normal speed?

A. Normal speed for silent film.

Q. And was this silent film?

A. This is silent film.

Q. And handing you Libelant's Exhibit 8, is that the film? A. Yes, this is the film.

Q. Do you recall what time of day you took it?

A. As I recall the moving picture was made somewhere in the vicinity of one or two P.M., after the longshoremen had turned to again, after lunch.

Q. And on what date?

A. On the 7th day of February, 1955.

Q. I notice on the box it says they were taken on the 6th. Are you sure whether it was the 6th or the 7th?

A. It was the 7th, this was an error because I had, when I put this on, I had inspected my expense account and it showed the 7th. That was the day,—excuse me,—it showed the 6th. That was the day I went down and the picture was taken on the 7th, the day after I got there. [21]

Mr. Pozzi: With the Court's permission we would like to have this picture run at this time.

Mr. Brooke: As I understand it counsel, this is to be used purely for illustrative purposes. It couldn't possibly portray the scene of the accident at the time.

(Testimony of Nick Chavios.)

Mr. Pozzi: I think the evidence will go to show, after we get through with this, that the actual—this film will show the actual operation as it was at the time of the accident; that the booms were in the same position as they were at the time of the accident. The only difference is that after the second accident they put two preventer wires on this big ship boom instead of the one that was on at the time of the accident.

Mr. Brooke: We will admit the use of the movie for illustrative purposes only, until such time as counsel shows—

The Court: Just a moment, I think that is the only purpose for which it could be admitted.

(Movie film shown.)

GLEN TITUS

Called as a witness for the Libelant, after being first duly sworn, testifies as follows:

Direct Examination [22]

Q. (By Mr. Pozzi): Will you state your name please? A. Glen Titus.

Q. Where do you live?

A. Coos Bay, Oregon.

Q. And what is your address there?

A. 1080 Lockhart Street.

Q. How many years have you lived in the Coos Bay area?

A. I have lived in the Coos Bay Area 29 years and better.

(Testimony of Glen Titus.)

Q. You were born in Oregon were you?

A. In Oregon.

Q. How far did you go in school?

A. Through high school.

Q. How many years have you been a longshoreman?

A. Since 1947.

Q. How old are you now?

A. Forty-five.

Q. Is it forty-five or forty-six?

A. I will be forty-six next month.

Q. How tall are you Mr. Titus?

A. Approximately five seven and three-quarter inches.

Q. How much do you weigh?

A. 205 pounds.

Q. Has that been your approximate weight the last few years?

A. Yes.

Q. Are you a married man?

A. Yes. [23]

Q. How many children do you have?

A. Three.

Q. How many at home?

A. Two.

Q. You have one grown about 24 and the other two are at home, is that right?

A. Yes, sir.

Q. How old is your oldest?

A. I have a daughter married that is twenty-six years of age, I have a boy that is thirteen, and the youngest boy, he will be eight the last day of this month.

Q. Mr. Titus, before this accident had you ever injured your right ankle, your foot or leg?

A. No, sir.

(Testimony of Glen Titus.)

Q. In longshore work, when you started longshoring, what kind of work did you do?

A. What we know as hold work.

Q. Will you explain what you mean by hold work?

A. We work down in the hold of the vessel stowing lumber. In our particular port we have nothing but lumber. We stow lumber in such a manner that we fill up all the available space of that ship with cargo.

Q. You mentioned that the only kind of cargo you have there is lumber, is that right?

A. Very small amount of pulp.

Q. You don't have what is as general cargo?

A. No, sir.

Q. Canned goods and things like that?

A. No, sir.

Q. Now, on the day of the accident, which was what date?

A. February 5th.

Q. What day of the week was that?

A. Saturday.

Q. What was your job that day?

A. I was assigned to gang sixteen that day, as winch driver.

Q. Had you been driving steady as a winch driver before that day?

A. No.

Q. What had you done before that?

A. Hold work.

Q. Had you learned how to drive the winch while working in the hold?

A. Yes.

Q. What does a winch driver do?

(Testimony of Glen Titus.)

A. He picks the cargo up,—he operates the winches that picks the cargo up from the dock and sets it in the hold of the ship.

Q. He manipulates levers then, is that right?

A. Yes, that's right.

Q. When you turned-to that morning with gang sixteen on the SS Santorini what hatch were you assigned to? A. Number one hatch.

Q. What time did you go to lunch or dinner that day? [25] A. Eleven o'clock.

Q. What is your normal eating time?

A. Twelve o'clock.

Q. What was the reason for going to lunch at eleven that day?

A. We had been ordered to go to lunch at eleven so that we may work in the number two hatch during the regular lunch hour from twelve to one.

Q. Now, was there a gang working in number two hatch before noon? A. Yes.

Q. What gang number was that?

A. Gang number one.

Q. Do you know whether or not Lief Thrush was a member of that gang?

A. He is a member of that gang, and was at that time.

Q. Do you know what his job was?

A. Winch driver.

Q. Were these winches what is known as singles or doubles?

A. They are what was known as double or slow speed.

(Testimony of Glen Titus.)

Q. I think you misunderstood me. What I meant is was it a two or a three legged job?

A. It was a single job.

Q. It was a two legged then?

A. It is where one man operates both winches.

Q. How many winch drivers then were in your gang?

A. Two. [26]

Q. You were one of them and who was the other?

A. Wilton Gunn.

Q. On this particular ship, that day, if Mr. Gunn was on the winches, what would your job be,—on this day of the accident?

A. Hatch tender.

Q. Tell the Judge whether or not you alternate, an hour on and an hour off the winches, in other words, did you change jobs with Mr. Gunn?

A. We do.

Q. At twelve o'clock when you shifted into the number two hatch to relieve the number one gang what was your turn to be, winch driver or hatch tender?

A. Hatch tender.

Q. All right, then you started tending hatch?

A. At twelve o'clock.

Q. What time did you say,—strike that please,—I don't think I asked that. What time did this accident happen, approximately?

A. 12:15, approximately.

Q. Will you tell the Judge what you had done up to that time, how much cargo you had moved, or had been moved in that fifteen minutes?

A. There was one load setting on the deck ready to set down into the hold when the men needed it.

(Testimony of Glen Titus.)

Mr. Gunn picked that load up and set it down in the hold. We went out and got [27] the top half of a load off the dock, had taken that into the hold and went back to get the bottom half of that load to set on deck until time to set it down into the hold. On that second load from the dock is when the preventer gave way.

Q. How was the ship tied to the dock, port or starboard? A. Port side to the dock.

Q. Port side to? A. Yes.

Q. All right, now, at the time of the accident were you at the port side of the vessel or starboard side of the vessel? A. Port side.

Q. We will hand you what has been marked 7a, 7f and 7g, they have been identified as pictures of the Santorini. Will you look them over and state if you have seen them before? A. Yes, sir.

Q. Those are pictures of the ship?

A. They are.

Q. I notice in those pictures that the ship is riding high in the water. Was the tide in or out when those pictures were taken?

A. Evidently the tide was in.

Q. Now, at the time the accident happened was the tide in or out?

A. It was riding high so evidently it would have to be in. [28]

Q. Now, will you state whether or not it was necessary for you to give signals to the winch driver in picking the loads up off the dock and bringing them up over the side of the ship? A. Yes.

(Testimony of Glen Titus.)

Q. In relation to the hatch where were you standing in giving the signals at the time the accident happened?

A. I was standing on the port side about the middle of the deck load and about even with the hold of the ship,—the hatch.

Q. By “even with the hatch” what do you mean, even with the edge, the middle or where?

A. The forward end of the hatch.

Q. Would that put you in a position,—state whether or not that put you in the clear of the gear, the moving parts? A. Yes.

Q. Would that put you in a position where the winch driver could see? A. That’s right.

Q. And also where you could see on the dock?

A. That’s right.

Q. Had you been talking with anyone immediately before the accident? A. I had.

Q. Who was it that you had talked to?

A. The walking boss. [29]

Q. What was his name?

A. William Hassan.

Q. Do you know where he was at the time the accident happened?

A. He had just left me and was at the after end of the hatch, approximately in the vicinity of the after end of the hatch.

Q. You mean by “approximately” that he was in about the same position with relation to the after end as you were to the fore end?

A. That’s right.

(Testimony of Glen Titus.)

Q. And was he on the same side of the vessel that you were,—on the port side? A. He was.

Mr. Pozzi: May I approach the witness, your Honor, with these pictures?

The Court: Yes, you may.

Q. Handing you what has been marked and admitted as Exhibit 7a, will you hold that up to the Court and show the Judge where you were standing immediately before the accident?

A. Just past the end of the leads where they are carried across the deck load, I was at this end.

Q. By "this end" you are indicating the forward end of the hatch? A. The forward end, yes.

Q. Handing you Exhibit 7b could you point to that and show the Judge where you were standing?

A. My position there was right where my finger is pointing, [30] which would be just after this shroud or guy line, we call it on board the vessel. I was standing just after that, about the middle of the deck, where I could see the winch driver, whose position was here (indicating) and also see the dock at the same time.

Q. There are some hatch covers piled up on top of the deck load between the number one and two hatches. Will you point those out to the Judge?

A. Here (indicating).

Q. Why are they put in there, in between the hatches?

A. It was the only safe place we had to put them.

Q. Now, you might explain that to his Honor,—

(Testimony of Glen Titus.)

you don't put them where you are moving the cargo over, and why is that?

A. Your Honor, the hatch covers are placed in this position here. Being here (indicating) the load might sweep them into the hatch on top of the heads of the men working there. On this side of the vessel we place what we call the beams, big iron beams that go across the hatch that the hatch covers lie on. They are placed on their side, taking up that space, so half of the hatch covers are placed between number one and number two on **this side**, and half of them are placed between number one and number two on this side where they will be in a safe position.

Q. Now, in your own words would you tell His Honor what happened to you,—you started to pick up this load where you were hurt, now, what did you do,—how did you tell the [31] winch driver to pick it up?

A. We use signals, and as we stand and he watches me I pick him up on the yard—what is called the yard boom until he took up the slack on that and then on the other one and then motioned for him when he had tightened into it and everything was secure around the load,—the slings,—I signaled him to pick it up and he came up hard on his yard and got the load approximately even with the deck load and started to pull it in toward the midship with what we call the midship fall and just as he tightened into it the off-shore preventer gave way.

(Testimony of Glen Titus.)

Q. How far inport, that is, toward the ship, had he moved that load with the midship before the midship preventer gave way? Where was the load with relation to the edge of the ship on the port side?

A. It was just about even with the deck load and still coming up because it had to go up over the stanchion, it was right close to the stanchion.

Q. All right now, is that the normal operation, the usual and customary manner of hoisting a load?

A. It is.

Q. This preventer that gave way, what is the preventer made of? A. Wire rope.

Q. Beside the preventer is there also a guyline over there on midship? A. There is. [32]

Q. When the preventer gave way did the guy wire also break? A. It did.

Q. What is the guy line made of?

A. Usually manila rope. Some good grade of rope.

Q. In this particular case you say the preventer gave way, now, what did you see and what did you do at that time?

A. When the preventer gave way it gave a loud report and I looked up and saw the off-shore boom swing in my direction, it had the block from the rope guy and also the preventer above the break whipping around in the air and I proceeded to get out of the way.

Q. Which way did you try to run to get out of the way?

(Testimony of Glen Titus.)

A. There was only one way I could go, that was toward the forward end of the ship.

Q. Just tell the Court what happened,—you turned and started to run and then what happened?

A. I grabbed the guy line or shroud, as we call it, and jumped over that.

Q. Now let me hand you 7b and you show the Judge what shroud or stay you are talking about?

A. This stay (indicating). I was on this side stay, I took told of that and jumped over that. I would have had to bend down to go on this side (indicating) and there was approximately about three foot space between that and the deck load, so I just grabbed that and jumped over the top of it and jumped into these hatch covers. [33]

Q. Did you land on the hatch covers?

A. No, I landed on the deck and slid under the hatch covers.

Q. In other words, you slipped and fell in trying to get out of the way, is that right?

A. Yes, that's right.

Q. Now, these pictures that you have looked at, 7b and so on, do they show the angle of the booms as they were at the time you were hurt, state whether or not they show that? A. They do.

Q. I notice that the yardarm, what you call the yardarm,—the port boom is way out toward the dock and the other boom, the midship is top high for the middle of the hatch, now, will you explain to the judge why they are rigged that way?

A. They are rigged that way so that you are able

(Testimony of Glen Titus.)

to reach out on the dock, pick up the loads of cargo and swing them in to the hold.

Q. What happened to you when you fell,—just tell the Judge?

A. Knowing that the preventer gave way, my first thought was to get up and give signals to the winch driver to set the load back down. He was holding the load, for fear of injuring someone else.

Q. Someone else where?

A. Out on the dock. I was unable to get up and by that time Mr. Hassan and Mr. Johnson, our hatch foreman came running [34] up and they set down the load and started looking after me.

Q. How were you removed from the vessel?

A. By basket.

Q. What gear did they take you off with?

A. Number one.

Q. Where were you taken?

A. McCauley hospital.

Q. Were you in pain? A. I was.

Q. Where did you hurt? A. In the ankle.

Q. How did you feel, just describe it to the Judge?

A. Well, my foot was turned quarter way around, instead of sticking out from the forward part of my leg it was sticking out the side,—out from the side and it hurt, it ached and I was taken to the hospital.

Q. What hospital?

A. The McCauley hospital.

Q. And what Doctor saw you there?

(Testimony of Glen Titus.)

A. Doctor Garner.

Q. X-rays were taken I presume?

A. Yes, they were.

Q. State whether or not they set your leg or foot?
A. I beg your pardon.

Q. Did they set your leg and did they give you any anesthetic? [35]
A. Oh, yes.

Q. They knocked you out at the hospital?

A. Yes, when I woke up I had a cast on.

Q. Now, did you have any trouble,—you were in the hospital until the 11th, is that right?

A. Yes.

Q. When you were discharged how did you get along?
A. Apparently very well for a few days.

Q. Then what happened?

A. I began to have complications set in under the cast.

Q. What did you notice and what did you feel?

A. It burned and itched.

Q. Was the cast taken off, that cast you had on when you were discharged from the hospital, was that taken off?
A. Yes.

Q. Now, did you ever have any dermatitis on that foot or leg before this accident?
A. Never.

Q. Were you treated for dermatitis?

A. I was.

Q. How long were you off work. When did you first get back to work?
A. On June 27th.

Q. Did you go right back to steady work or did you miss some time after June 27?

A. I went to work June 27th driving winch and

(Testimony of Glen Titus.)

I drove until [36] the 30th. After July 1st I had to turn down jobs seven different days due to the fact that I didn't feel that I could work in the hold.

Q. What did you earn in the year 1953?

A. \$5475.00.

Q. What did you earn in the year 1954?

A. May I look at the record?

Q. Yes, you may. A. \$4798.72.

Q. In 1953,—is there an explanation why your earnings dropped from 1953 to 1954?

A. Yes, sir.

Q. What is that reason or explanation?

A. We had a sawmill and Lumbermen's strike in the Coos Bay area.

Q. How many months work did you lose on that account? A. About two months.

Q. In 1955 after you were hurt, from February 5 to June 27 was there plenty of work available if you had been able to work?

A. From the reports that I gathered from some of the other boys, there was quite a bit of shipping.

Q. Was it normal? A. It was normal, yes.

Q. Was there any strike on? A. No. [37]

Q. Mr. Titus, when the Doctor released you for work, what kind of work did he release you for?

Mr. Brooke: We object to that, the Doctor has already testified that he released him for regular longshore work.

Q. Mr. Titus, did you discuss, with the Doctor, your returning to work? A. I did.

Q. In June, returning in June? A. Yes.

(Testimony of Glen Titus.)

Q. State what you told him?

A. I met him at his house and I asked him when I could go back to work and he said any time, and he asked me what I did and I told him I drove winch, and he asked me if I did any heavy lifting——

Mr. Brooke: I will object to what the Doctor told him, he should not be permitted to testify to what the Doctor said to him?

Mr. Possi: That's correct.

Q. What did you tell the Doctor about the kind of work you did?

A. I told him I drove winch?

Q. Did you explain what it involved?

A. He asked——

Q. Not what he said to you,——

A. ——I told him it involved working levers.

Q. Did he release you to do that work?

A. To go ahead and try it.

Q. Now, Mr. Titus, are you able to work in the hold of a ship now? A. Well,——

Q. ——to do the cargo handling, that end of the work? A. No.

Q. Are you able to drive winch? A. Yes.

Q. Mr. Titus will you take your shoe and stocking off, the right foot Mr. Titus? Now, pull your pants leg up. Now put your feet together. Mr. Titus, your right foot appears to be larger in this area and more filled out than it does on your left foot, now, how was your right foot before the accident as compared to your left?

(Testimony of Glen Titus.)

A. It was normal,—it was the same.

Q. Did they look the same? A. Yes, sir.

Q. Now, Mr. Titus, I want you to hold your feet together about like this (indicating.) Now, bend them up together like this (indicating) bend them as best you can. Now, do you have your right foot up as far as you can bend it? A. Yes, sir.

Q. Now, bend them down. Now, Mr. Titus, put your feet apart. Now, rotate them together,—in. Try to do it together. Are you able to do it together? A. No. [39]

Q. Now look at me,—rotate them the other way,—can you do that? A. No.

Q. Now hold your knees together and rotate your feet, not your knees. A. Outward?

Q. Yes. You can't get them to go together, is that right? A. That's right.

Q. Is your foot swollen now, as you sit there?

A. Yes.

Q. Have you been off your feet today or off them? A. Off most of the time.

Q. Now, Mr. Titus, when you are on your foot all day working does that foot get any bigger than it is right now? A. Some days it does, yes.

Q. Are you able to lift on that foot?

A. No, that's why I can't work in the hold.

Q. Are you able to climb ladders up and down in the hold? A. Not very conveniently.

Q. Why not, what is the trouble?

A. Due to the stiffness in the action of that foot.

Q. Do you have any pain in that ankle or foot?

(Testimony of Glen Titus.)

A. Yes, sir.

Q. Just show the Court, put your hand where the pain is?

A. Right across the ankle here. At time it does pain down through here too. [40]

Q. Have you ever spent a day since this accident when that foot is free of pain, when you haven't done any work at all? A. No.

Q. Now, when you walk like a person does, and go up on your feet like this (indicating) does that hurt you at all? A. Yes.

Q. Now, this discoloration that is on your leg, just below your knee and on down, all of this (indicating) on both sides, now, Mr. Titus, was that there before the accident? A. No.

Q. Has it been there since this skin infection?

A. It has.

Q. Is it getting any better? A. No.

Q. About how many months has it been since it improved at all?

A. Well, it looks just the same as it did after the scabs healed up.

Q. And that was last spring? A. Yes, sir.

Q. Now, I notice that you have a scar here on the inside of the left side of your foot, what is that?

A. That is from the cast.

Mr. Pozzi: You may inquire.

Cross Examination [41]

Q. (By Mr. Brooke): The first day you went

(Testimony of Glen Titus.)

to work was February 5th,—let me ask this,—had you worked the day before the accident?

A. I had.

Q. At the number one hatch? A. No.

Q. Where had you worked the day before the accident? A. On another ship.

Q. That's what I meant. The first day you worked on the Santorini was on the 5th?

A. Yes.

Q. And you worked on the number one hatch?

A. Up to eleven o'clock.

Q. Up to that time had the gang at number two been loading steadily into the hold?

A. So far as I know they had.

Q. Just prior to the accident you had been talking to the walking boss? A. That's right.

Q. And had he left your company and started toward the after part of the ship? A. He had.

Q. Where was he when the accident happened?

A. At the after end of the hatch.

Q. Walking toward the stern?

A. No, he was standing there looking toward me.

Q. What kind of lumber were you loading at the number two hatch when the accident happened?

A. At number two?

Q. Yes?

A. I believe it was two by sixes,—it was two inch lumber.

Q. Two inch lumber, about twenty feet long?

A. In that neighborhood.

Q. I think you said it was about half a load?

(Testimony of Glen Titus.)

A. Half a carrier load.

Q. Can you estimate how many pieces of timber were actually in the load? A. No, I couldn't.

Q. Which side of the shroud were the hatch covers,—were they forward or after the shroud?

A. They were forward of the number two shroud.

Q. The one you jumped over? A. Yes.

Q. You didn't land on those when you fell?

A. No, I landed on the deck and slipped.

Q. You have been in Coos Bay working as a longshoreman since 1947? A. That's right.

Q. Prior to that time you were a truck driver?

A. I had held many jobs.

Q. They have strikes from time to time there in the Coos Bay [43] area don't they, Mr. Titus?

A. Occasionally.

Q. When they have those strikes they have work stoppages, generally that's the case isn't it?

Mr. Possi: I think I better object to that,—what kind of strikes and stoppages.

Q. Work stoppages of longshoremen?

Mr. Possi: I object on the ground that it is irrelevant, it doesn't tend to prove or disprove any issue in this case, about any other work stoppage.

Q. When they have lumber strikes in the Coos Bay area does that generally involve work stoppage for longshoremen?

A. Yes, if there isn't any lumber manufactured you can't load it on ships.

Q. Now, do you know how the rope guy on the

(Testimony of Glen Titus.)

starboard boom at number two hatch was rigged prior to the accident?

A. How the rope guy was rigged?

Q. Yes.

A. In the usual manner.

Q. Did you have two blocks through which the rope guy was passed?

A. I believe it was a single block with a double pulley in it, a double block you might call it, it wasn't two blocks at the one end and I believe it was a double block at the other end.

Q. How many times did the rope guy pass back and forth between [44] where it was secured to the upper part of the pendant and the pendant attached to the deck?

A. Passed through three times.

Q. Then it is tied to the pendant?

A. On the fourth turn.

Q. Explain to the Court what a pendant is?

A. In this instance a pendant would be the length of wire that ran from the block to the top of the boom.

Q. And there is also a pendant that leads from the rail to the lower block?

A. We usually speak of that as the strap.

Q. That was the setup on the particular boom at the time of your accident?

A. To my recollection it was.

Q. You were employed by an independent stevedoring Company were you not?

A. That's right.

(Testimony of Glen Titus.)

Q. You were not an employee of the steamship Company?

A. I was dispatched from the Union hiring hall.

Q. Was your gang as well as the gang at number two hatch employed by an Independent Stevedoring Company?

Mr. Possi: Counsel I think we agreed to that. Your Honor, it is a fact that in the Pretrial Order, that is agreed to.

Mr. Brooke: That the longshoremen are employed by the Stevedoring Company and not by the ship. [45]

The Court: It is so understood.

Mr. Brooke: That's all.

Redirect Examination

Q. (By Mr. Pozzi): I would like to ask this witness, as the picture was being shown or run, to say where the load was at the time the preventer wire broke. Are you able to do that by looking at the pictures? A. I think perhaps I can.

(Moving picture film ran.)

A. About right there.

Q. Is that about how much he had on the midship at the time it broke?

A. Right there, this deck load was not quite at the top of the stanchion.

Q. How much drift did he have left on that yardarm?

A. You mean from this point here to where it tightlined?

(Testimony of Glen Titus.)

Q. No, just on the yard arm itself, straight up to the block?

A. Oh, I would say ten or fifteen feet.

Q. How much on the midship?

A. Oh, it traveled from here a long ways up there.

Mr. Pozzi: That's all from this witness.

Mr. Brooke: That's all.

The Court: We will take a fifteen minute recess at this time.

January 16, 1956, 3:15 p.m.

[46]

WILLIAM HASAN

called as a witness by the Libelant, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Pozzi): Will you state your full name please? A. William Hasan.

Q. Where do you live?

A. North Bend, Oregon.

Q. What is your occupation?

A. Longshoreman, at the present time I am walking boss.

Q. What is a walking boss,—first let me ask for what Company are you a walking boss for?

A. Independent Stevedore Company.

Q. What is a walking boss?

A. More or less loading supervisor I guess you would call it.

(Testimony of William Hasan.)

Q. Are you boss of gangs of men that are on the ship? A. Yes sir.

Q. Now, Mr. Hasan, were you working on the SS Santorini on February 5, 1955 when the Libelant here was hurt? A. Yes sir.

Q. What was your job that day?

A. Walking boss.

Q. Did you walk that ship the day before?

A. No.

Q. When you came aboard that morning will you state whether [47] or not the gang at number one hatch and also at number two hatch, did some rigging on the ship?

A. On that particular day there were two walking bosses, one on the fore end and one on the after end and I happened to be on the after end so I couldn't tell you, it would be hearsay because I was on the after end.

Q. And you were not present on the forward end in the morning when you turned to? A. No.

Q. Were you present, and walking the vessel between twelve and one o'clock when a gang was in number two hatch relieving the gang that was regularly assigned? A. Yes.

Q. In other words you were working between twelve and one when the other walking boss was at lunch, is that right? A. Yes.

Q. Did you see the accident happen?

A. Yes.

Q. I hand you what has been marked as 7b, will you show the Judge from the picture where you

(Testimony of William Hasan.)

were standing,—I don't know whether that shows it or not.

A. It doesn't show in this picture here, but I was standing here (indicating) when the hook went out, and then I walked back here where you can't see on that. I was standing here (indicating) before the break. [48]

Q. Then at the time of the break where were you standing?

A. I walked toward number three hatch. I had been talking to Mr. Titus and he said something to me and I turned around and was facing Mr. Titus and looking at the dock at the same time, facing number two hatch,—the winch driver and the hatch.

Q. Now, on that picture that you have in your hand, as well as 7b, will you state whether or not that shows the angle of the booms and the position of the booms as they were at the time of the accident?

A. Yes,—you have two preventers on there now and that is not the way it was at the time.

Q. After the accident, — you mention that now there are two preventers on there,—after the accident on the 5th what was done? What did the sailors do, did they put on two preventers instead of one? A. Yes.

Mr. Brooke: Now, your Honor, I move to strike that——

The Court: It may be stricken.

Q. After the accident happened——

(Testimony of William Hasan.)

Mr. Pozzi: Your Honor, I don't want to go contrary to the Court's ruling.

The Court: I think it is a well established rule that testimony as to any correction made after an [49] accident happened is not admissible.

Mr. Pozzi: If it please the Court, I don't wish to dispute the Court but in admiralty matters as well as Federal Employer Liability Act cases under the Railroad Act it is proper to show corrections made after the accident. I do not have available at my finger tips the citation of authorities.

The Court: It will be a surprise to me if that is the law but under your statement I will permit this testimony and——

Mr. Brooke: The point is your Honor, there has never been any contention that there should be two preventer wires, the universal custom is to have one preventer wire and one rope guy.

The Court: I will let you go ahead and put in this testimony, this being a court trial I will be somewhat liberal and I will look into this later.

Q. After the gear carried away will you state whether there were two preventers put on that ship, if you know?

A. I wasn't there when they put it on, if that is what you mean.

Q. Did you see it there after it was rigged that way? A. Yes.

Q. Now, Mr. Hasan, will you tell the Judge in your own words what you saw at the time of the accident?

(Testimony of William Hasan.)

A. Mr. Titus started to give signals and I was watching him [50] and the load and he gave the signal to pick up the yard boom and I would say that about ten—between ten and fifteen feet, and he gave the signal on what you call the midship boom to pull the load in and he just took the slack out, he wasn't quite to the stanchions, eight or nine foot stanchions, whatever they were, and about that time I heard the pop and I looked over to the starboard side and I saw the preventer swinging over and I saw the rope guy and I hollered at the winch driver to look out and I stepped back four or five feet and I saw Mr. Titus turn around and go toward number one hatch and then after the wire swung over I didn't see Mr. Titus and the load was still out there swinging so I gave Mr. Gunn, the winch driver, signals to lower the load, I saw the dock was clear so I had to lower the load so that no one would be hurt by the load swinging.

Q. You say you saw the load swinging, where was the load in relationship to the gunnel of the ship when you saw it out there swinging?

A. I would say five or six feet, something like that.

Q. Which way, inboard or outboard from the gunnel of the ship?

A. Outboard, after it broke, the boom swung in and the load naturally went out toward the dock away from the ship.

Q. How long have you been walking boss for the Independent Stevedore Company?

(Testimony of William Hasan.)

A. About three and a half years. [51]

Q. How long have you been working steady as a walking boss?

A. Two years.

Q. Do you have an opinion as to whether that load was being hoisted in the usual and customary manner?

A. Yes, it was.

Q. Now, after the accident happened to Mr. Titus, did you talk to the chief mate on the ship?

A. Yes, I did. I was on my way to phone for an ambulance and I hollered to the dock men to get a basket and I started out toward number three hatch. I don't recall just where I met the mate whether it was by the gangway or where it was, but I told him that the preventer broke and a man was hurt, and he came up, of course, too and I went out on the dock to call an ambulance, after I saw that Titus was hurt.

Q. Will you state whether or not you went back aboard the ship after that?

A. Yes, I went back.

Q. After you went back was the preventer wire, —the pieces still hooked on the rail of the ship?

A. The end part was still laying on the ship. I don't remember whether the preventer flew off the boom or not, I couldn't say that, I don't recall.

Q. State whether you looked it over?

A. I went over with the mate to see what had happened, to see what was going on.

Q. What did you observe there? [52]

A. Well, I saw the broken part there, the broken

(Testimony of William Hasan.)

guy and broken preventer laying there on the bottom, the end still fast on the bottom.

Q. Would you state whether or not that preventer wire, the part fastened,—well, state where it broke in relationship to the pad eye?

A. About a foot or a foot and a half above the pad eye on the bull rail.

Q. Do you recall what kind of setup they had on the bull rail, cleats and pad eyes at the place where this rigging was hooked up?

A. I noticed that they only had one cleat there and when they made the preventer fast they couldn't go back toward number one hatch because number one hatch had taken them cleats and we had to come back to number two hatch in order to secure the preventer wire, that's the only place they could go.

Q. You say there was only one cleat, how many pad eyes were there?

A. Two forward and two aft of the cleat.

Q. Why couldn't they have secured both of them on the same cleat, both number one and number two? A. They never do.

Q. What is the reason?

A. Well if number two broke then the boom of number one would go down too, in other words, you would lose both booms. [53]

Q. Then it is a matter of safety?

A. Yes sir.

Q. Considering the angle of the booms and the

(Testimony of William Hasan.)

lift that was being made, should that wire have held?

Mr. Brooke: I object to that, that question calls for a highly speculative answer. The question doesn't contain all of the facts——

The Court: I don't know whether you have laid a foundation for him to give an opinion on that. It didn't hold,—I think I will sustain the objection.

Q. You have been a longshoreman for how many years? A. Ten.

Q. Have you operated winches? A. Yes.

Q. Have you rigged ship's gears? A. Yes.

Q. State whether or not it is necessary for longshoremen working ships to rig gears?

A. Oh, yes.

Q. Do you have an opinion as to what was the cause of the line, this preventer wire breaking?

Mr. Brooke: We object to this question. This man,—this witness has not been established to be a man familiar with wire rope and what will break and what won't under certain stresses. He has not been qualified as a [54] scientific man who could take into consideration the stresses and strains that are placed on wires. The question is improper to put to this man.

The Court: I don't think that sufficient foundation has been laid to permit him to answer this question. I don't think he is shown to be qualified however, I will let him answer and I will pass on the question of his qualification later. He may answer.

(Testimony of William Hasan.)

A. Will you repeat that question.

Q. Yes, do you have an opinion as to the cause of the failure of the wire under those circumstances as they were at the time of the accident?

A. So far as the rigging is concerned——

Mr. Brooke: Can you state whether you have an opinion?

A. Yes.

Q. Yes, do you have an opinion Mr. Hasan?

A. Yes sir.

Q. Now, you can explain that opinion to the Court?

A. So far as the conditions on the ship are concerned, it was rigged right. That's the way we normally rig the gear. If you only have one cleat there is nothing else you can do. If you have two cleats then there is one to the cleat, but there are lots of ships rigged that way. Under normal conditions there must have been a defect somewhere or it wouldn't have broke. The load was an average load, a twenty foot load, a half a [55] carry load, it come in two sections.

Q. Were the other gears on the ship, all the other hatches hoisting the same size loads?

A. More or less during the day, yes.

Mr. Pozzi: Now, if we may have the film again I would like to have this witness point out if the number one rigging the same as shown in the film, that is, the angle of the booms and so on, where they were winched to, and the height of the boom, were they approximately the same as they were at

(Testimony of William Hasan.)

the time of the accident, and to have him point out where the load was as he saw it at the time he heard the gear give way.

A. Yes, about the same, and I was standing about in there (indicating).

Mr. Pozzi: You may inquire.

Cross Examination

Q. (By Mr. Brooke): What time did the long-shoremen turn to that morning?

A. Eight o'clock.

Q. You hadn't worked the ship the day before?

A. No. I was either off or on another ship.

Q. And you just came forward during the noon hour,—to the forward part of the ship?

A. Yes.

Q. Now, I think you said that the load was five or six feet out over the port rail of the ship after the preventer [56] wire parted?

A. After it broke it was five or six feet,—I mean it was swinging out.

Q. That would be the natural thing to happen would it, Mr. Hasan? A. Yes.

Q. In fact, you have no support from your star-board boom so the load would swing out so it would hang underneath the yard arms, is that correct?

A. He already had a little strain,—started to strain on this midship and after it had broken it would have to go back out.

Q. Now when you said that the preventer wire

(Testimony of William Hasan.)

was parted about a foot or a foot and a half from the pad eye, what do you mean by the pad eye?

A. The pad eye that is on the boom rail.

Q. Is that the pad eye to which the preventer wire was attached?

A. It is the one the first preventer went through.

Q. It was about a foot and a half above that?

A. Somewhere in there.

Q. It went through a pad eye to another pad eye, is that what you testified to?

A. Yes, it went through a pad eye on the bulwark and then there is a pad eye down there by that big bit down there, I think it went through there and he doubled it up in there somewhere. I don't recollect just how they had the bottom fastened, but usually they run it through the two pad eyes [57] and put a half-hitch and tie it off.

Q. They didn't run it through two pad eyes in this case?

A. Yes, they had to to make it fast.

Q. Do you remember what they made it fast to?

A. I don't remember where it went after the second pad eye, it went to the first and then on to the second one and they had to go around another pad eye in order to secure it, but I can't tell you truthfully just how.

Q. You don't know exactly what the arrangement was? A. Not on the bottom, no.

Q. At the first pad eye it went through, there was a distance of about a foot or a foot and a half

(Testimony of William Hasan.)

above that to where the preventer parted, is that correct? A. That's right.

Mr. Brooke: Your Honor, I don't wish to waive my objection to this man's testimony about what caused the break but I would like to ask a question on that?

The Court: You may cross examine without waiving your objection.

Q. Your opinion was that there must have been a defect, did you see the defect? Did you see any defect in the wire? A. No.

Q. You are not qualified to tell whether there was a defect or not, are you?

A. Just looking at it I couldn't tell.

Q. I noticed that you said it was about an average load, do [58] you know what kind of lumber it was?

A. I believe it was two by six, but I couldn't swear to that.

Q. And was it about twenty feet in length?

A. Yes.

Q. By average load what do you mean, half a carrier load.

A. Yes sir, sling loads we call them,—two sling loads come in one carrier load.

Q. Who segregates out the size, is that done by the sling men down on the dock? A. Yes sir.

Q. The size of the loads? A. Yes.

Q. What do you think the approximate weight of that load was, or can you estimate?

A. A ton or a ton and a half at the most.

Mr. Brooke: That's all.

Mr. Pozzi: That's all.

WILLIAM WILTON GUNN

called as a witness on behalf of the libelant after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Pozzi): Will you state your full name please? A. William Wilton Gunn.

Q. Where do you live?

A. North Bend, Oregon. [59]

Q. What is your occupation?

A. I am a longshoreman.

Q. How many years have you been longshoring?

A. Oh, for 14 years.

Q. Do you recall this accident which occurred to the libelant here on February 5, 1955?

A. I do.

Q. On that day what gang were you working with? A. Sixteen gang.

Q. What was your job?

A. I was winch driver and hatch tender.

Q. Were you the winch driver at the time he was hurt? A. I was.

Q. Mr. Gunn, what hatch were you in at the time he was hurt? A. Number two hatch.

Q. What time of day did the accident happen?

A. Oh, it was around 12:15.

Q. You were in there relieving number one gang that had gone to lunch? A. That's right.

(Testimony of William Wilton Gunn.)

Q. When you had come aboard that morning had you rigged the number one hatch?

A. We rigged it, yes.

Q. And what time did you go to lunch?

A. Eleven o'clock.

Q. Now, in your own words, tell the Judge what you did when [60] you got to number two hatch at 12 o'clock up to the time of the accident?

A. Well, I came aboard and it was my time to drive the winch, and I climbed down in the hold and turned the steam on, one load was setting on deck and I hooked on to it and the boys told me to bring it on in and I took that load in and I set it down, I goes back out on the dock and I picked up one more load and I brought it in and set it down in the hold and I went back out to get another load and I brought it up to the top of the ship and the preventer gave and the load went back out on the dock and I was holding it there, I didn't have no hatch tender, Glen was hurt, and so I held it there until Bill Hasan set it back on the dock to keep from hurting somebody. I turned the steam off,—they were going to get a basket to take Glen off with and so I turned the steam on number one gear, took the water out of the winches so I could take him and put him back on the dock in the basket with the gear.

Q. Mr. Gunn, from where you have been sitting in the Court room have you been able to view the moving pictures?

A. I could see a little of it,—a very little.

(Testimony of William Wilton Gunn.)

Q. I will hand you exhibit 7b and ask you if you recognize that as being a shot of the Santorini and the way the lumber was on deck at the time he was hurt?

A. Yes, I do.

Q. Now, will you point out to the Judge where you were at [61] the time of the accident?

A. I was right in here running these handles here, right in between here, in front of the hatch.

Q. Where was Mr. Titus?

A. Right up here, in here (indicating).

Q. Can you show the Judge or tell the Judge where that load was at the time of the accident, at the time the preventer gave way?

A. Well the load was just about even with the top of the deck load which is right here (indicating) but it was out on the Dock. Whenever I brought it to the top I took it across there to try to come as close to the deck load as I can and I started to pulling it across when the preventer gave.

Q. Did you have plenty of drift then from the midship down?

A. Very much so, yes.

Q. Had the load gotten high enough for you to see the whole load before the accident happened?

A. I could see the load as it was, yes.

Q. Could you see the bottom of it as well as the top?

A. Just about, it was just above, well, I would say just about even with the deck load.

Q. Did you have a chance to go over after the accident happened and look over the damage that had been done?

(Testimony of William Wilton Gunn.)

A. I took Glen on the dock in a basket, and when I came back to number two gear to look at it the sailors had taken [61-A] the preventer and stuff away, they had removed it.

Q. Could you state whether or not at the time you were hoisting—strike that please, — Mr. Gunn can you state whether at the time of the accident you were hoisting that load in the usual and customary manner? A. Yes sir.

Q. Can you state whether or not that was the normal lift?

A. Yes, it was just like we always take.

Q. Now were the winches singled up or doubled up? A. They were doubled up.

Q. Explain to the Judge what you mean by that?

A. Some ships come in, and we always have the procedure there, that's our safety rule, to double up the winches in taking lumber and that slows the winches down where they run slower which we figure is more safe.

Q. One more question, when that midship preventer gave way did the load strike the deck load at all? A. No.

Q. How high was that deck load?

A. Six foot approximately.

Q. How long were those stanchions?

A. Oh, eight foot, eight and a half foot.

Mr. Pozzi: You may inquire.

Cross Examination

Q. (By Mr. Brooke): I hand you, Mr. Gunn,

(Testimony of William Wilton Gunn.)

photograph which has been identified as [62] respondent's pre-trial exhibit 4a, a picture of the SS Santorini, after the accident. Does that appear to be the Santorini to you?

A. It looks like it, yes.

Q. Did you have occasion to look at the setup of the rope guy at the starboard forward boom in the number two hatch after the accident?

A. No sir.

Q. Did you see it before the accident?

A. I did not, I was driving the winch.

Q. Did you know anything about it?

A. I did not.

Q. Does that appear about the relationship of the deck load with the rail of the ship and the stanchions?

A. Yes sir.

Q. You have heard the word tightlining used haven't you Mr. Gunn?

A. I have.

Q. Will you explain to the Court what that is?

A. That is whenever you take a load up and you don't have quite clearance enough, your offshore and your inshore fall come tight on top, your line on top is completely tight, one straight stretch across the top where ordinarily you should have sag in it, it should be hanging down.

Q. Isn't the result tightlining when one winch is pulling against the other?

A. Well, yes, there would be. [63]

Q. And that puts an excessive strain on your preventer and rope guy does it not?

A. It would if you were tightlining, sure.

Mr. Brooke: Respondent offers exhibit 4a in evidence.

The Court: It may be admitted.

Mr. Brooke: That's all.

Mr. Pozzi: No further questions.

LEON E. THRUSH

called as a witness on behalf of the libelant after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Pozzi): State your full name please? A. Leon E. Thrush.

Q. Where do you live Mr. Thrush?

A. North Bend, Oregon.

Q. What is your occupation?

A. Longshoreman.

Q. How many years have you been a longshoreman,—what year did you start?

A. Somewhere around 1930.

Q. What different jobs have you done as a longshoreman, what are you trained to do?

A. Oh, holdman, dockman, jitney driver, winch driver and hatch tender.

Q. Were you working on the SS Santorini on the 4th and 5th [64] days of February 1955?

A. I was.

Q. Where was the vessel lying?

A. The Coos Bay Lumber company dock.

Q. Was she lying starboard or port side to?

A. Port.

Q. What gang were you in?

(Testimony of Leon E. Thrush.)

A. Number one.

Q. What was your job on number one gang?

A. Winch driver and hatch tender.

Q. Do you recall what time you started to work,
—what day you started on the Santorini?

A. I believe it was on Friday at one o'clock.

Q. That was Friday the 4th?

A. I believe so.

Q. What hatch was your number one gang assigned to?

A. Number two.

Q. Is that considered the long hatch or the big hatch?

A. Usually it is the big hatch on a Liberty ship.

Q. Was this a Liberty type vessel?

A. It was.

Q. Now, did you have any trouble with the gear on Friday the 4th of February at the number two hatch?

A. We broke the preventer on the midship boom.

Q. What time of day did it break?

A. Somewhere around four o'clock. [65]

Q. Do you recall what the cause of that was?

A. It was just rusted out up by the eye, at the end of the boom.

Q. Was there another preventer put on?

A. There was.

Q. Who put it on?

A. Sailors,—ship's crew anyway.

Q. On February 5, 1955, what time did you go to work, that would be the next day?

A. Eight o'clock.

(Testimony of Leon E. Thrush.)

Q. Was it necessary to do anything with the gear at the number two hatch when you came at eight o'clock?

A. We had to rerig the midship boom.

Q. Who was in charge of that?

A. Ordinarily it would be our boss or the hatch tender, I supervised the rigging of that, that morning.

Q. You are the man that did it, is that right?

A. Supervised it.

Q. Will you explain the setup on that rail, explain it to the Judge, as to cleats and pad eyes, what did you have?

A. I believe there was a cleat in the middle and two pad eyes on each side, two forward and two aft, of the cleat, almost abreast of the masthouse.

Q. Did you use the cleat to tie her off on the morning of the fifth?

A. No we did not.

Q. Why didn't you?

A. Number one gear had got there first and had the cleat used. [66]

Q. They beat you to it, is that right?

A. That's right.

Q. Ordinarily are there two cleats or one cleat on a ship?

A. Usually two.

Q. On this kind of a setup?

A. There is usually two.

Q. And were there on this ship?

A. No.

Q. Now, since the number one had already gotten to the cleat first, how did you rig?

A. We went through the forward pad eye first,

(Testimony of Leon E. Thrush.)

that's to bring the boom down through the forward pad eye, back through the after pad eye and I think they went around and around through the two pad eyes and then a half hitch, with the end to a pad eye or back to the grounded parts of the line.

Q. Why didn't you go through the after pad eye first, why didn't you go through that?

A. It wouldn't have given us quite as good a lead from the boom to the rail and it would have increased the leverage that the boom would have had on the preventer.

Q. Will you explain what that had to do,—where you placed the preventer through on the rail, what that has to do with safety?

A. If the guy wire was put in the best place possible it would be directly out from the pull that you are going to have on your boom, there is nothing out there but water so [67] you would have to come back down to the rail on an angle, so you get the longest angle that you can without getting too far back so your boom will topple.

Q. Is that what you did with what you had to work with that morning?

A. That's what we did.

Q. What size wire was that?

A. I would say it was three-quarter in diameter.

Q. Do you recall the number of strands, was it six?

A. Six strands.

Q. Before you started longshoring did you ever work in the woods?

A. I did.

Q. What did you do in the woods?

(Testimony of Leon E. Thrush.)

A. Choker setter, chaser, and rigging slinger.

Q. Were you in the service during world war two? A. I was.

Q. Did you serve in Europe? A. Yes.

Q. What branch of the service were you with?

A. Army engineers.

Q. What was your rating? A. T 4.

Q. What does that mean?

A. Technical Sergeant.

Q. Did you have anything to do with wire rope?

A. The T was for rigging, rigging rating I think it is 198 or [68] 189 in the army regulations or whatever you call it.

Q. Did you handle European wires as well as American wires while you were in Europe?

A. Nothing but European wire so far as I know.

Q. Will you state whether or not European wire is ordinarily hard or soft wire?

Mr. Brooke: I object to that your Honor, what happened in world war two as compared to the present situation——

Mr. Pozzi: All right, I will withdraw it. Now, I will offer 4 and 5 which have previously been identified.

Q. Mr. Thrush, I hand you what has been marked 4 and 5, is that hard wire?

A. I would say it was soft wire.

Q. Do you generally find that kind of wire made in the United States?

A. I don't believe that I have ever seen this kind or brand of wire, let me put it this way, I don't

(Testimony of Leon E. Thrush.)

believe I have ever seen a United States Brand on this kind of wire, I don't know for sure.

Q. During your years as stevedore where have you occasionally seen this kind of wire, or where have you seen it.

A. Usually on a foreign ship.

Q. I will ask you to take a look at this wire in the box here (indicating) is this the same stuff that you have in your hand? [69]

A. I believe it is.

Q. You mentioned that this is a softer type of wire, can you demonstrate to the Judge by the use of that wire with a harder type of wire,—is it possible for you to demonstrate with your hands to show the difference between what is known as hard wire and soft wire?

A. This soft wire is similar to a piece of bailing wire if you bend it that way, it stays bent, and a hard wire would snap back quite a ways, maybe not all the way but most of the way. It wouldn't stay bent.

Q. Do you know the kind of wire, using the words 'hard' or 'soft', the kind of wire that should be used on a preventer?

Mr. Brooke: We object to that on the ground that the witness is not qualified to answer the question.

The Court: I will let him answer.

A. The kind that I feel safe around is American made eight strand or six strand, harder wire than this.

(Testimony of Leon E. Thrush.)

Q. I hand you what have been marked as exhibit 8, three-quarter, eight strand by nineteen,—you saw this this morning here in Court, I showed it to you. Will you state whether or not that is a hard or soft wire?

A. That is what I would call ordinarily, more or less a soft wire in American wire,—there is American wire a lot harder than this, a lot springier. [70]

Q. Can you show the Judge with that and the exhibit in your hand, the difference in the wires?

A. Well, one strand bent and let loose comes back, will spring right back, much springier than this. This stays put.

Mr. Brooke: It is a question of relative strain.

Q. If you bring this (indicating) down it wouldn't snap back that far? A. That's right.

Q. Mr. Thrush, would you, assuming that the gear and the load was where Mr. Titus and the other witnesses have said, that is, that the load was being hoisted up and the angles were as you left them at noon time when you went to lunch, the load was just being taken with the strain on the midship to pick it on in and at that point the preventer broke. Do you have an opinion as to what caused the break?

Mr. Brooke: Your Honor, we object, this man has not made an examination of the wire from a metallurgic standpoint and his answer would be purely speculative, he hasn't determined whether there were any defects in the wire, what the pull strength of the wire is. I don't think he has had any

(Testimony of Leon E. Thrush.)

scientific training of any kind and I think his answer would be without any significance in this case.

The Court: I am inclined to agree with you but this being a court matter, I will let him answer now and I will determine later what weight to give this [71] testimony later.

A. It would be my opinion that the wire used in the preventer just wasn't strong enough to handle the load, whether there was a defect in it or not, I wouldn't be able to say, but there shouldn't have been enough strain on that load to break the preventer.

Q. Now, what is the purpose of the preventer and this rope guy, will you explain the purpose of those?

A. A guy to hold the boom back up in position where you want it held, to give you the proper position of the booms on the ship. The preventer and the guy holds it in position. It's the same as a guy wire on a telephone post, it keeps it from pulling through your load all the time, otherwise it would swing.

Q. Now, what is meant by equalizing the preventer and the guy?

A. Usually we make our preventer,—in number one gang, we make our preventer fast or solid, we throw all the rope guy loose and pull on it with a cargo hook fastened to the deck to take all the slack out of the preventer and then we pull our rope guy back up, take a turn on the cleat and then let it slip

(Testimony of Leon E. Thrush.)

in until we can get the tension on the rope and the preventer as near equal as possible.

Q. On the morning of the 5th of February did you equalize the guy and the preventer?

A. We did.

Q. The fact that they both broke will you state if that is a [72] sign that you had them equalized?

A. They were pretty well equalized or they would have both broken almost together.

Mr. Pozzi: You may inquire.

Cross Examination

Q. (By Mr. Brooke): Will you describe the rope guy that hooked to the midship boom?

A. Describe the rope guy?

Q. The Block and tackle arrangement.

A. I believe it was two double blocks that the rope was brought through them.

Q. Does the rope start first at the lower block and go up and down and then up and hook to the rail?

A. Hook to the rail,—oh, I get what you mean.

Q. The end of the rope is secure to the rail isn't it?

A. I would have to stop and figure out where that was fastened to.

Q. I hand you, Mr. Thrush, respondent's exhibit 4a. This shows the Port side of the vessel and it also shows——

A. It should be about here.

Q. It shows a block and tackle arrangement and

(Testimony of Leon E. Thrush.)

rope guy, I think on number three hatch, is that approximately the type of arrangement you had?

A. Yes, sir, it was a double and single block.

Q. That gives you four runs of the rope? [73]

A. Yes sir.

Q. You never had any metalurgic experience, any scientific training in any college or university, have you Mr. Thrush?

A. No, only when I was dock foreman and figuring for the strength of wire.

Q. Have you had any experience in chemical work in analyzing wire? A. No.

Q. Where were you at the time of the accident?

A. I believe I was at Mack's seafood tavern eating dinner.

Q. You were not there at the ship?

A. No, it was my lunch hour.

Mr. Brooke: That's all.

Redirect Examination

Q. (By Mr. Pozzi): Do you ever hoist cargo gear on rope guy alone,—do you ever hoist lumber on a rope guy without a preventer? A. No.

Q. Why wouldn't you?

A. It wouldn't be strong enough alone.

Q. It won't hold it alone?

A. It won't hold it.

Q. Then is it true that the purpose of the preventer wire is to hold the weight of the load?

A. Yes sir.

Mr. Pozzi: That's all. [74]

(Testimony of Leon E. Thrush.)

Recross Examination

Q. (By Mr. Brooke): It's the purpose of both to hold? A. Yes.

Mr. Brooke: That's all.

Mr. Pozzi: Yes, that's all.

JOHN P. JOHNSON

called as a witness on behalf of the libelant, after being first duly sworn testifies as follows:

Direct Examination

Mr. Pozzi: Before we start on this witness I notice that counsel had offered respondent's exhibit 4a yesterday and I would like to ask counsel when this was taken, about what date?

Mr. Brooke: That was taken about the 11th.

Mr. Pozzi: I notice that it shows that the ship was further down in the water.

Mr. Brooke: It was not for the purpose of showing the height of the ship.

Mr. Pozzi: Very well.

Q. Will you state your full name?

A. John Pete Johnson.

Q. Where do you live?

A. North Bend, Oregon.

Q. How old a man are you? [75]

A. Fifty-eight will be fifty-nine next September.

Q. What is your occupation?

A. I am employed as a longshoreman, as a hatch boss.

(Testimony of John P. Johnson.)

Q. How many years have you worked as a longshoreman, what year did you start?

A. I started in 1914, but I worked continuously at longshoring since 1924.

Q. What other kind of work have you done beside longshoreman?

A. I have worked in the woods.

Q. You have also been a logger?

A. That's right.

Q. You say you are a hatch boss, how long have you been a hatch boss, about what year did you start that?

A. About '34.

Q. Now you were the hatch boss on gang number 16, on February 5, 1955?

A. That's right.

Q. The libelant here Glen Titus was one of your winch drivers?

A. That's right.

Q. When you went aboard the Santorini what hatch did you start to work in?

A. We started in number one hatch.

Q. And why did you shift into number two?

A. On account of number two being the big hatch and number one the smaller than number two, why, if they can get the noon hour in there they get extra time in which helps to [76] even up the loading of the hatches.

Q. What time did your gang shift into number two hatch?

A. We went to lunch at eleven o'clock and came back to number two at twelve o'clock.

(Testimony of John P. Johnson.)

Q. When you shifted to number two, you came back at twelve o'clock to turn the gang to?

A. That's right.

Q. Then what did you do if anything.

A. For one thing we checked the gear.

Q. Why did you check the gear?

A. On account of what had happened the day before I thought it would be for the safety of the gang that I would, I checked it myself personally.

Q. You always double check everything yourself? A. Yes, I do.

Q. Now, just tell the Judge how you checked over the gear?

A. I went over to the rope guy and wire preventer and felt of them, what the tension is on there and at the same time I examined how the wires and everything is fastened.

Q. Now, there has been testimony here I think on the side next to the dock,—on the side away from the dock, the off-shore.

A. The off-shore side.

Q. How was the ship lined to the dock, that is port or starboard? A. Port to the dock.

Q. Port to? A. That's right. [77]

Q. Were you at the hatch when the accident happened?

A. I was at the after end of number two hatch when the accident happened?

Q. Port or starboard? A. Port.

Q. From where you were standing could you see

(Testimony of John P. Johnson.)

the libelant Glen Titus and did you see him at the time of the accident, from where you were standing?

A. Yes.

Q. Did you see Mr. Hasan, the Walking Boss?

A. Yes.

Q. Where was he standing in relationship to you?

A. He might have been a little further back.

Q. He was near you, was he?

A. He was not far away, but whether he was in front or in the back I don't know.

Q. Now, tell the Judge in your own words what you observed, what you saw happen?

A. Well, Mr. Titus gave signals to bring up the load from the dock and about,—I would say, when it was about to the top of the deck load, about there, the offshore rigging, I mean the rope guy and preventer carried away and the load would naturally have to swing out on the dock on account of the offshore gear carried away. Mr. Gunn who was driving winch done wonderful by not dropping that and hurting someone else out there on the dock. [78]

Q. Now, could you tell the Judge where the load was when the preventer gave way in relation to the bull rail of the ship?

A. I would say it was practically on top of the deck load.

Q. Now, in relationship to the bull rail,—just hold your left hand up and make that the bull rail and just show the Judge where the load was?

(Testimony of John P. Johnson.)

A. Here—

Q. Put the other hand where the load was? Do you understand what I mean?

A. Yes, I understand, I would say it was possibly two or three feet above,—about in here (indicating).

Q. At that point when the preventer broke how much drift did you have on that yard arm?

A. At that point where the load was when the preventer broke do you mean?

Q. Yes. A. Maybe fifteen feet.

Q. And how much drift did you have on the midship?

A. We generally taut that up to the limit. I don't know the exact length of the boom but I would say in the neighborhood of thirty feet,—about thirty feet.

Q. You might explain to the Judge what you mean by drift?

A. Drift is to avoid tightlining, we taut the midship as tight as we can so that you have the lifting instead of tightlining, and the more drift you have, naturally, the easier tension you have on the gear.

Q. After the accident happend what did you do?

A. Well, it's a rule of the Union that I have to go, with the man, to the Doctor in the ambulance, and that's what I did. That's what I did when the ambulance got there but before that naturally I went up to see what was the matter with Mr. Titus

(Testimony of John P. Johnson.)

and see that we got a Doctor, I mean to get an ambulance to get him to the hospital.

Q. You took charge, in other words, to get him off the ship and get him to the hospital?

A. With the aid of the walking boss.

Q. Did you go with Mr. Titus to the hospital?

A. I did.

Q. Will you state whether or not at the time the preventer gave way, that the hoisting operation was being done in the usual and customary manner?

A. Yes.

Q. And according to the usual and customary practice? A. I would say it was.

Q. There has been talk about a rope guy and a preventer guy, do you ever hoist cargo by using the rope guy without a preventer?

A. No, it is not the practice.

Q. Why isn't it? A. For safety.

Q. What do you rely on to hold that boom out?

A. The wire preventer. [80]

Q. Now, if the wire carries away what effect does the rope guy have?

A. If the wire carries away, most generally the rope guy will carry away too, that is because it wouldn't be able to take the strain that broke the wire.

Mr. Pozzi: You may inquire.

Cross Examination

Q. (By Mr. Brooke): Mr. Johnson, did you work the ship the day before the accident?

(Testimony of John P. Johnson.)

A. No, I didn't.

Q. I mean the SS Santorini?

A. I came on the morning the accident happened, there was other gangs that maybe was on there but we wasn't.

Q. When your gang shifted to the number two hatch, did I understand you to say that you went over and felt the tension on the preventer wire and rope guy? A. That's right.

Q. To find out if they equalized, is that the purpose?

A. That's right, and to see how they were secured.

Q. Was the strain equalized?

A. I would say it was, otherwise we wouldn't have went to work.

Q. Did you make an accident report to anyone as a result of this accident?

A. I have got to make a report of any accident.

Q. What was that Mr. Johnson? [81]

A. I say I have to make a report where any accident happens.

Q. Do you have that with you?

A. No, I am sorry, that was turned over, I imagine to our dispatcher,—our Union.

Mr. Brooke: Do you have that counsel, it is listed as an exhibit.

Mr. Pozzi: What I listed, I think, was the accident report of the walking boss, wait a minute, I

(Testimony of John P. Johnson.)

believe I have a copy. I will have this marked as exhibit 10.

Mr. Brooke: That's all the questions I have to ask this witness at this time.

Redirect Examination

Q. (By Mr. Pozzi): Do you make your report out separately from the walking boss?

A. Yes sir.

Q. Do you see the walking boss's report before you make yours out or afterward, or what? How do you work that.

A. I make my report out and then if I have a chance I will check with the walking boss and see how we compare on the accident.

Mr. Pozzi: Now, Your Honor, I am going to offer this since counsel mentioned it. I have a copy and I didn't have the original, I have this copy and it is typed and I offer it as libelant's exhibit 10 for identification [82] which purports to be a copy of the statement signed by walking boss W. Hasan. It is entitled Glen Titus, Number 286, February 5, 1955, hour 12:15 P.M., Date accident reported to foreman,—the same. Ship, Santorini. Dock, Coos Bay Lumber. On ship or dock,— on ship Number 2 hatch. How did accident occur? Preventer on starboard boom swung over hatch and tender in trying to get safely away, slipped on deck, right leg going underneath pile of hatch covers on deck, twisting right knee and ankle. Part of body injured,—right

(Testimony of John P. Johnson.)

knee and ankle twisted, hatch boss J. P. Johnson, Number 140. Witness, W. Gunn. Sent to Doctor,—yes. Were wages paid for full day, no. I will offer this.

Mr. Brooke: Your Honor, this is Mr. Pozzi's typewritten paper here. I think the document is incompetent, what we are asking for is this man's report.

Mr. Pozzi: Counsel knows how to get this report and he has made no effort to do so, now if he is raising any question at all——

Mr. Brooke: ——The point is, I asked that be produced and you come ahead and produce this.

Mr. Pozzi: This is the first that I have heard about it.

Mr. Brooke: I said I asked the witness if he had it or if you had it. [83]

Mr. Pozzi: No, we don't have it, but you are welcome to this.

Mr. Brooke: I think this is incompetent.

The Court: I will sustain the objection. I don't think it is material here.

Mr. Pozzi: That's all.

Mr. Brooke: Nothing further.

Mr. Pozzi: I would like to clear with the Clerk on the exhibits not admitted.

The Court: Certainly you may do so.

Mr. Pozzi: The exhibits that are not admitted but just marked, I would like to offer them at this time. I think the series 7, the pictures are not ad-

mitted and I would like to offer them, number 7b, 7c, 7d, 7e, 7f, 7g and 7b, there seems to be two 7b's, and 7a.

Mr. Brooke: I understand these are offered for the purpose of illustration, if that is correct I have no objection.

The Court: That is right.

Mr. Brooke: I have no objection.

The Court: They may be admitted.

Mr. Pozzi: I believe the moving picture is already admitted in evidence.

The Court: It is admitted, yes.

Mr. Pozzi: And this wire that was referred [84] to as Exhibit Number 9, that Exhibit was referred to but not offered or admitted.

Mr. Brooke: I object to the admission of that wire, I can't see any relevancy to that.

Mr. Pozzi: I will offer it, Your Honor.

The Court: It may be admitted.

Mr. Pozzi: Now, I will ask the Clerk if he has Exhibits 4 and 5 as being admitted, and if not I will offer those.

The Court : They may be admitted.

Mr. Pozzi: The libelant rests. [85]

HARRY CZYZEWSKI

called as a witness by the Respondent, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Brooke): Will you state your full name please? A. Harry Czyzewski.

(Testimony of Harry Czyzewski.)

Q. And do you reside here in Portland?

A. Yes sir, I do.

Q. What is your profession?

A. I am a metallurgical engineer.

Q. Where are your offices?

A. The offices of my company Metallurgical Engineers Incorporated are at 2340 Southwest Jefferson, they are located in the Charlton Laboratories Building.

Q. Now, where did you receive your college training?

A. I have a Bachelor of Science degree in metallurgical engineering from the University of Illinois and also a Master of Science degree from the same university.

Q. And did you go on and do any teaching after that?

A. Yes sir. I spent four years as assistant professor at the University of Illinois, 1947 to 1951.

Q. And then what did you do?

A. I have been manager of Metallurgical Engineers Incorporated here in Portland since that time.

Q. Do you belong to any metallurgical societies?

A. Yes, I do, I belong to the American Institute of Mining and Metallurgical Engineers, also the American Foundrymens Society.

Q. Have you written any papers for any of those societies?

A. Yes, I have had papers published by both of

(Testimony of Harry Czyzewski.)

those societies and the society of Mechanical Engineers.

Q. Have you been on the research Department of any Corporations?

A. I spent forty months from 1946 on the research department of Caterpillar Tractor Company.

Q. Does your company make any tests or research for companies in this area at the present time?

A. Yes, the Metalurgical Engineering Company have an engineering testing laboratory and we, in that capacity, perform a great many tests on metal products.

Q. For various companies? A. Yes sir.

Q. Does that include work with steel wire rope?

A. Yes, we have made many tests on steel wire rope?

Q. Have you testified as an expert in Court,—as a metalurgical expert?

A. I have, yes, I am a registered professional engineer in the states of Oregon and Illinois.

Q. Who do you do testing work for in this area?

A. A wide variety of firms, if you have in mind specifically any work——

Q. Can you name several?

A. We have the Heister Company; Iron Fireman Manufacturing; The Williamette Iron and Steel Company; the Northwest Marine Iron works; The Alpine Engine and I could list a great many of them, firms in town here.

(Testimony of Harry Czyzewski.)

Q. Do you do any work for public bodies,—the Government?

A. Yes, we do. We have made tests for the Bon-neville Power Administration. We do Welder qualification work under the Bureau of Labor.

Q. Have you done work for the Army Engineers?

A. Yes, we have done work for the Army Engineers; the Navy; the American Bureau of Shipping. We are a certified laboratory for those and we are also certified by the Air Force.

Q. And what is your position up there?

A. I am the manager.

Q. Mr. Czyzewski, the Bailiff has handed you a box containing two pieces of wire rope, or two pieces of one wire rope, will you please examine those and state to the Court whether you have ever seen those before?

Mr. Pozzi: We object to that question, counsel is assuming that they are two pieces of the same rope. I object to the form of the question. [88]

Mr. Brooke: If your Honor please, the deposition of one of Respondent's witnesses, exhibit 7 established the fact that these pieces came from each side of the wire that parted on the ship, and we will tie that in with these depositions.

Th Court: Go ahead.

Q. Have you examined those exhibits?

A. Yes, I have.

Q. And have you seen those before?

(Testimony of Harry Czyzewski.)

A. I have, yes, I have tags with my name on identifying those two pieces.

Q. Where did you get the two pieces?

A. I received them from you.

Q. Did you have an opportunity to make a metalurgic examination of those wires at my request?

A. Yes sir, I made several types of examination.

Q. What type of examination did you make?

A. The fracture area I examined visually and with a,—what we call a wide field binocular microscope with magnification up to twenty-five power. We also made an examination—samples were taken from the parted ends of the ropes and we made a hardness test on the samples and also a metalagraphic examination of the internal structure of the metal.

Q. At the fracture site did you find that the wire was intact completely or were certain sections removed. [89]

A. It appears that several strands had been removed by cutting.

Q. How many strands?

A. There were two strands on one length and one on the second. I would have to refer to my notes to identify them with the exhibit.

Q. Did you have opportunity to examine the missing strands from the wire after you informed me that there were certain strands missing?

A. I had an opportunity to examine some missing strands.

(Testimony of Harry Czyzewski.)

Q. Was that in Mr. Pozzi's office?

A. It was.

Q. How many did you examine?

A. May I check my notes on that?

Q. Yes, you may.

A. I had marked two twelve inch lengths of strand and one twenty-four inch length, I have marked here that the stubs opposite the fractured end were painted green on the twelve inch lengths and on the twenty-four inch length the stubs were painted a pink.

Q. Do you have the two green ones?

A. Yes.

Q. Now, what is the size of that wire, will you explain that to the Court?

A. We classify that as a three-quarter inch wire rope, six by twenty-four,—seven fiber. [90]

Q. What do you mean by seven fibers?

A. That means that there is a fiber in the center of each of the six strands and also in the center of the rope.

Q. Now, what, if anything, in the way of defects did you find at the fracture site, or in the wire?

A. At the fracture we made a visual examination and we found that the failure was typical of a tensile or a pull type of break. We found that in one of these lengths of wire there was a bend in several of the strands adjacent to the site of fracture. Beyond that we were not able to identify any

(Testimony of Harry Czyzewski.)

defects. We were looking particularly for corrosion, wear, signs of brittleness and such things as that.

Q. And you didn't find any?

A. We were not able to find any.

Q. And you were able to determine that the wire parted as a result of tensile pull, is that correct?

Mr. Pozzi: We object to that as counsel is leading the witness.

The Court: He may answer.

A. Our findings were that the break was characteristic of a tensile break.

Q. Can you draw that on the Board, show the Court,—can you explain that?

A. Starting with an individual wire, a round wire of this type, when the wire is loaded in tension and when the pull is in this direction (indicating) it starts to [91] stretch and when it passes the yield point the wire stretches permanently until it reaches the level of its ultimate strength at which time a ductile wire will produce what is called a necking down, and have an effect of this type (indicating). This necking down is a characteristic of ductile steel failures. The actual characteristic is measured and reported in properties in steel and is referred to as a reduction in area or part of the tensile break. This is a characteristic of tensile failure and it is very easy to identify a tensile failure because of it.

Q. Can you clarify to us what exactly do you mean by a tensile break?

A. The term tensile refers to pull. In other

(Testimony of Harry Czyzewski.)
words, a pulling apart and that technical term is tensile,—in contrast the pushing together or compressive which is the pushing together or tearing apart at right angles.

Q. And from your examination of this wire you were able to determine that was a tensile break in this case? A. That's correct.

Q. Will you state whether or not you were able to determine what the tensile breaking strength of this particular wire was?

A. We made an effort to do that without actually running the strength test, and the manner in which that was done was to take that section away from the fracture and to make a hardness test of the individual wires and estimating from [92] the hardness test and the size of the wire the tensile strength of the rope.

Q. What did you find was the tensile strength of the rope?

Mr. Pozzi: Objected to Your Honor on the ground that there is no proper foundation laid to make a determination of what the strength was. In order to make such determination he would have to assume an exact duplication of what occurred at the time of the accident, that is,—the angle of the boom, the weight of the load, whether the lift was still or swinging, the height of the boom, the strength of the winch, the pull power in order to determine the breaking strength.

The Court: I will let him answer.

(Testimony of Harry Czyzewski.)

Q. Now, what did you determine to be the tensile strength of this wire?

A. On the basis that I have stated we determined it to be 14.4 tons.

Q. The breaking strength? A. Yes.

Q. In your experience in actually testing wires after you have computed the breaking strength as you have done with this wire, how would your test come out, that is, what is the relation of the test to the actual strength?

A. We have found that they were reasonable valid, a little on the conservative side. We have found the actual tensile strength could run as high as ten per cent above the calculated values. [93]

Q. Did you examine wire rope booklets with respect to the breaking strength of comparable wire to the one we have in this case?

A. You mean catalogs?

Q. Yes. A. Yes, I did.

Q. And what did the catalog indicate as the breaking strength of this type of wire?

Mr. Pozzi: We will object to what a catalog indicates.

The Court: He may answer.

Q. I have before me the supplement to catalog 1 of British Ropes Limited of Vancouver B. C. and they list the breaking strength of extra flexible hoisting rope construction 6 by 24 seven fiber core as I have identified this rope, in the mild plow steel of three quarters inch diameter to be 17.7 tons.

(Testimony of Harry Czyzewski.)

Q. And was it your determination that the wire in our case was mild plow steel?

A. We made the determination based on hardness and metalographic examination that this wire most closely conformed to mild plow steel.

Q. Now, do you have your machinery handbook with you? A. I do.

Q. Can you, or maybe you have already checked and have it in your notes, do you know what the tensile breaking strength [94] of $\frac{5}{8}$ inch 6 by 19 plow steel wire is?

A. At the time of our investigation I had made notes to the effect of that strength, and I have it here. The minimum breaking strength of $\frac{5}{8}$ inch mild plow steel 6 by 19 hoisting rope, I found to be 13.1 tons.

Q. My question was plow steel, not a mild plow steel? A. The plow steel was 14.4 tons.

Q. That is the same figure you found to be the strength of our wire here?

A. It came out to be that close.

Q. Did you refer to your table to find out what the breaking strength of one inch diameter or three inch circumference three strand manila rope would be?

A. I found from catalog data that manila rope one inch diameter three strand type was 9,000 pounds or four and a half tons.

Q. When we say one inch in diameter what does that come out in circumference?

(Testimony of Harry Czyzewski.)

A. That is listed as a three inch circumference type of rope.

Q. If a rope,—one inch diameter rope passes through a block starting from the bottom block and going up once, down, up and then secured down so that there are four separate lines running down does that, from an engineering standpoint increase the strength of that rope four times?

A. The carrying power of the assembly would be increased by the number of turns of rope used.

Q. If there were four lines, the strength of the assembly would be increased four times, is that correct?

A. That is correct.

Q. Now, if a steel wire rope such as the type we have in this case is leading down from a boom to a pad eye where it takes a sharp turn before it is secured to the rail, what effect, if any, does the sharp turn have on the weakening of that wire a distance say, a foot or a foot and a half away from the turn?

A. The effect of the turn is reduced to a negligible effect after one lay,—one rope lay, I haven't determined exactly how much one lay would be in this rope but I think it is about,—well, maybe I better look and give you the specific figure, it appears to be about six inches.

Q. Then the weakening effect would be confined to a space of about six inches?

A. That's right.

Q. And as you move further away from the apex the weakening effect becomes less through

(Testimony of Harry Czyzewski.)

that six inches does it not? A. That is correct.

Mr. Brooke: No more questions.

Cross Examination

Q. (By Mr. Pozzi): In order to determine the weakening effect at the apex you would have to know the angle at which the wire was broken, wouldn't you? [96]

A. The angle and the diameter of the bend.

Q. Yes,—and it may be greater or less depending on the angle and size of the bend?

A. It would be influenced very greatly by the bend.

Q. You have appeared as a witness for the office of Wood Matthiessen, Wood and Tatum before? A. Yes.

Q. Do you expect to be paid for your testimony here today? A. Yes.

Q. In your direct testimony you said that you took some samples from the end of the wire. How many samples did you take in the test, from the end of the wire?

A. We took three strands from each side.

Q. And there are how many strands?

A. Six.

Q. And did you test the very end of each wire in each strand?

A. Maybe I better show how the test is done—

Q. —And if you will answer my question first, did you test the end of each wire of each of these strands that you tested?

(Testimony of Harry Czyzewski.)

A. I think if I described how it was done you would see then that an end was tested, you said the ends, there are several ends involved and there is where I am having trouble answering the question.

Q. All right, go ahead.

A. We took three strands and mounted them in this plastic so that they would be convenient to hold. You see the way [97] you polish a section perpendicular, or rather we polished a section perpendicular to the line of the rope, now we made our examination, metalographic examination of this cross section, the internal structure of the metal and we made our hardness test on this end that is exposed.

Q. You have in that end a full strand, is that right?

A. Three strands in each of the mounts.

Q. How many wires are in each strand?

A. Twenty-four.

Q. And did you test each of the twenty-four wires in each of the strands?

A. No, we made a sampling of the wires in each of the strands.

Mr. Pozzi: That's all.

Mr. Brooke: We would like to offer in evidence the exhibits testified about.

The Court: They may be admitted.

Redirect Examination

Q. (By Mr. Brooke): You have also testified against us have you not?

A. Yes, I have.

Q. You say you have?

(Testimony of Harry Czyzewski.)

A. Yes. I may have misinterpreted a question of counsel's I want to say that I will not be paid for my testimony, I will be paid as an expert witness.

Mr. Brooke: That's all. [98]

Mr. Wood: Your Honor mentioned last night when the statement was made concerning a witness that was not available, that counsel may be able to stipulate as to what the witness would testify to if called. I have discussed it with Mr. Pozzi and we have been able to stipulate.

The Court: I thought you could.

Mr. Wood: The witness is Captain P. Larsen and if called he would testify that he has had past experience as a mate and captain sailing with the American Merchant Marine and that his occupation is that of a Marine Surveyor and that he has been a marine surveyor in Portland for the past ten years,—that the usual custom and practice of American Ships, both Liberty ships and Victory ships is to make up preventer wires out of $\frac{5}{8}$ inch plow steel wire. That it is customary in the practice to make up such preventers out of sections of the same wire as is used for winch runners and that the breaking strength of such preventer wires is 14.4 tons, also that he has examined the manila rope in this case exhibits of which will be introduced, being the manila rope,—that that is what is termed three inch rope having a diameter of one inch and that it is substantially new rope and that it is in good condition and that the standard cata-

logued breaking strength of such rope is nine thousand pounds,—that when it is rolled through blocks so that you have four lengths [99] of rope that you get the strength multiplied four times. That would be his testimony and I think counsel will stipulate that Captain Larsen would so testify that these are facts.

Mr. Pozzi: It is so stipulated with the additional stipulation that what is called $\frac{5}{8}$ inch plow steel is commonly referred to in our country and other countries as hard wires.

The Court: I thought you would stipulate to those facts, in fact, I don't think I have had attorneys that were so agreeable in my Court before.

Mr. Wood: I think we can agree that there are various degrees of hardness, there is what is called plow steel, mild plow steel and improved plow steel. I think it can be stipulated that plow steel is a degree of hardness above mild plow and improved plow is a degree of hardness above plow steel.

Mr. Pozzi: Yes, it is so stipulated.

HERMAN LARSEN

Called as a witness by the Respondent, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Wood): State your name to the Court? A. Herman Larsen.

Q. Where do you reside? [100]

A. At 5026 Northeast 10th Avenue, Portland.

Q. What has been your past experience aboard ships and in connection with ships?

(Testimony of Herman Larsen.)

A. Well, sir, my entire life you might say has been connected with ships, I started following the sea as a boy in the old country where I was born and I continued with that right up to the present date.

Q. How old are you Mr. Larsen?

A. I am sixty-nine.

Q. Do you have a license with the American Merchant Marine?

A. Yes, sir, I have a masters license the Ninth issue.

Q. And have you sailed as an officer, a mate in the American Merchant Marine?

A. Yes, sir, since 1916.

Q. What are some of the Companies you have sailed for?

A. The Madsen Steamship Company, The States Line out of Portland, The West Coast Trans-Oceanic, the Old Pacific Coast Steamship Company.

Q. For the Court's information, which officer on the ship is generally in charge of the rigging, of the Cargo gear.

Q. The Chief Mate is the man who is considered to supervise the rigging of the cargo gear.

Q. And have you sailed as Chief Mate for all of those companies that you mentioned?

A. Yes, sir.

Q. Have you sailed as Master?

A. I have been Master since 1934. [101]

Q. For what companies have you sailed as Master?

(Testimony of Herman Larsen.)

A. The States Line, and the West Coast Trans-Oceanic.

Q. What type of ships?

A. Liberty ships and Victory ships.

Q. Did you sail all through the war?

A. Yes, sir.

Q. Have you had stevedore experience?

A. Yes, sir, I was walking boss for the Oregon Stevedore Company from 1920 to 1922, the month of April.

Q. Did you ever do work for the Luckenbach Steamship Company?

A. Yes, sir, during that period I was walking boss for the Luckenbach Company also.

Q. Captain Larsen, what type of wire is usually and ordinarily used on American ships, liberty type ships for making up preventer wires.

A. Preventer wires are usually made up from Cargo runners that have been damaged, that is, kinked in some way where they are no longer used as Cargo runners. The good part is then used for preventer wires that usually is $\frac{5}{8}$ plow steel wire.

Q. $\frac{5}{8}$ plow steel wire? A. Yes, sir.

Q. You say Cargo runners that have been damaged, do they use the damaged parts in making up preventer wires?

A. No, sir, only the good part is used. I might explain it this way,—the cargo runners on Liberty ships is usually [102] 190 feet, that is the general length, while the cargo preventer on the cargo boom are about 100, 110 or 115 feet long, and you

(Testimony of Herman Larsen.)

can see the good part can always be used as a preventer.

Q. And they cut out the bad sections?

A. That's right.

Mr. Wood: Before I refer to these and maybe offer them in evidence I will say to the Court that at least we will connect them up. They are identified in the deposition of the Chief Mate of the ship.

The Court: Very well, you may proceed.

Q. Captain Larsen, referring to exhibits 3c and 3d, the two sections of rope, have you examined those? A. Yes, sir.

Q. What size rope is that?

A. That's three inch manila.

Q. You have examined that, have you?

A. Yes, my observation tells me that it is substantially good rope, it is not old and it has not been abused in any way.

Q. Captain Larsen, what is the size of the rope ordinarily used on ships for the rope guys used to guy out the booms? A. Three inch manila.

Q. Is that the same as you hold there?

A. The same as this rope here.

Q. Captain Larsen, have you in your experience known of gear, that is, preventer wires and rope guys in good condition, to break? [103]

A. No, I would say this, rope comparatively new three inch manila with a preventer guy of $\frac{5}{8}$ inch plow steel wire, it would have to be something radical to make anything carry away there, be-

(Testimony of Herman Larsen.)

cause you have practically twice the tensile strength in holding your boom to what you have in lifting your cargo pull.

Q. What could be the causes of breaking if the gear is in good condition?

Mr. Pozzi: Object to what could be, we are not dealing in possibilities here.

The Court: I think possibly your objection is well taken but I will let him answer, this is before the Court.

A. Well, the most logical thing that could cause the breakage with the gear in perfect condition is the operation of the winches, for instance, the jerking of taking a heavy load in. Steady pull on the winches won't break the preventer nor the manila but jerking could cause it to break, in fact, jerking of heavy loads can break most any kind of gear.

Mr. Pozzi: I move to strike the answer on the same ground.

The Court: I will let it stand at this time, but I will say this, there is no evidence here of any jerking.

Q. What about tight lining? [104]

Mr. Pozzi: The same objection.

The Court: The same ruling, he may answer.

A. Tight lining could cause a breakage as well as if it was done with the power of the winches, or jerking with the power of the winches.

The Court: I do think it is immaterial here but you may go ahead.

(Testimony of Herman Larsen.)

Q. If there is jerking or if there is tight lining will that break gear that is up to full strength?

Mr. Pozzi: The same objection.

The Court: I think all this is immaterial, but I will let him answer.

A. I will say that tight lining,—in the weakest part of any gear, tight lining will cause a break there.

Q. Captain, you have examined this rope, did you look at the piece or section of wire preventer that is introduced in evidence here?

A. I see it there, yes.

Q. You made no metalurgical examination of it?

A. No, I haven't.

Q. From your observation how does it appear, how does its condition appear?

A. This wire you might say is in perfect condition, the wire itself, whatever caused the breaking of this wire must have been something beyond merely the weight of lifting the load, it couldn't have been merely that, because [105] this wire in the condition it is in would withstand the lifting of any ordinary load up to the capacity of the booms.

Mr. Pozzi: I move to strike the answer on the same grounds.

The Court: I will let it stand.

Q. Captain, having looked at the wire and the rope,—first, did you hear the testimony of the metalurgist?

A. Yes, I did.

Q. Assuming that a metalurgical examination

(Testimony of Herman Larsen.)

showed that the wire rope had no defects what would your opinion be as to the cause of the breaking?

Mr. Pozzi: Objected to on the ground that the question has incorrectly stated the testimony of the metalurgist, that the wire had no defect, it was that the part he examined had no defect, as a matter of fact it was just the opposite, and on the further ground that there is no foundation laid. In order for this witness to give an opinion he would have to know the exact angle of the boom and the power of the boom and the condition of the winches, whether or not the winches were doubled or singled out, the height of the ship, the height of the drift——

The Court: I have been very liberal in the trial of this case, but I think I will have to sustain this objection.

Q. Captain, based on your experience, what is the effect of [106] jerking or over-straining of a wire rope as to whether the failure or parting of a wire rope always occurs at the moment it is over-strained or whether a series of over-straining can cause a breaking at a later moment?

Mr. Pozzi: The same objection as previously stated.

The Court: I will allow him to answer.

A. I have found in my experience that a wire and a rope can be damaged by over straining and by jerking and a weakness will later show up where the strain was on the wire or rope.

Q. Under such conditions have you known a

(Testimony of Herman Larsen.)

wire rope to part under what would be a normal or customary lift?

Mr. Pozzi: The same objection.

The Court: He may answer.

A. It is quite true and I have found that if a wire rope were damaged and the damage was not detected and then the usual strain was put upon it, that could cause it to break.

Mr. Wood: That's all.

Cross Examination

Q. (By Mr. Pozzi): What do you do right now, Captain, what is your job?

A. I am at home at present, I am standby captain for the West Coast Trans-oceanic, relief Captain.

Q. You have been captain of Liberty ships haven't you? A. Yes, sir. [107]

Q. What do you mean by doubling up the gear,—the winches on a Liberty ship, not the gear, the winches?

A. Well, they have two gears, what they call the fast and the slow and the heavy lift and ordinary.

Q. And if winches are doubled up they run slower and smoother do they not?

A. They run slower, not always smoother but slower.

Q. What difference is there in the speed, that is in percentage?

A. I don't know,—I just can't tell you the exact percentage.

(Testimony of Herman Larsen.)

Q. On the number two hatch on a Liberty ship when the winches are singled out are the fastest winches you have are they not?

A. That's right.

Q. Those are the big winches and the big drums?

A. That's right.

Q. And they operate rather jerkily don't they?

A. Not always, that depends on the winches, some winches run smooth, it depends on the condition of them.

Q. They run smoother when they are doubled up?

A. That depends on the upkeep of them, sometimes they do and sometimes they don't.

Mr. Pozzi: I think that's all.

(Remarks of Court and Counsel as to the manner of submitting deposition.)

DEPOSITION OF JOHN KYRIACOS

was read into the record. [108]

Direct Examination

Read by Mr. Brooke:

Q. What is your name? A. John Kyriacos.

Q. What is your home address?

A. Kiaton, Korinthias, Greece.

Q. How old are you? A. I am 53.

Q. Are you a merchant seaman? A. Yes.

Q. How long have you been going to sea?

A. About thirty-five years.

Q. How long have you been going to sea as a licensed officer? A. How long?

(Deposition of John Kyriacos.)

Q. Yes. A. Oh, twenty-five years.

Q. Do you have master's papers? A. Yes.

Q. Have you ever served as a Master?

A. Yes.

Q. What is your present job?

A. Chief Officer.

Q. On which ship?

A. On this ship, the SS Santorini.

Q. What kind of ship is the SS Santorini?

A. It is an American type Liberty ship, she is making around all over the world. [109]

Q. An American Type Liberty ship?

A. Yes.

Q. Were you on the vessel,—I believe it was last Saturday, when a longshoreman was injured?

A. Yes.

Q. You were on the vessel? A. Yes.

Q. Where were you when the accident happened? A. I was in the Saloon.

Mr. Wood: I might interject here,—a saloon on board ship is where they take meals, where meals are served. I mention this because the Court said at the beginning that he wasn't too familiar with some of the terms.

The Court: Don't you hesitate at any time to give me any information you want to.

Q. Having your lunch? A. Yes.

Q. Do you remember approximately what time the accident happened, approximately?

A. Yes, 12:15.

(Deposition of John Kyriacos.)

Q. Where was the vessel at the time of the accident? A. Alongside, it was alongside.

Q. What is the name of this dock?

A. Coos Bay. [110]

Q. Is it in,—it is the Coos Bay Lumber Company dock, is that correct? A. Yes.

Q. That is where the vessel is now?

A. Yes.

Q. And that is where it was when the accident happened? A. Yes.

Q. When the accident happened the vessel was right here? A. Yes.

Q. Which side of the vessel was to the dock?

A. Port side, the same side as now.

Q. At which hatch did the accident happen?

A. Number two hatch.

Q. How did you learn about the accident?

A. How did I—

Q. Who told you about the accident?

A. The boss did.

Q. Is that the walking boss? A. Yes.

Q. And did you go out there? A. Yes.

Q. What did you see?

A. I saw the preventer broken.

Q. On which side of the hatch?

A. On the starboard side.

Q. Was it the forward? A. Yes, forward.

Q. What was broken?

A. A preventer and rope guy.

Q. And that was on the starboard, offshore boom? A. Yes.

(Deposition of John Kyriacos.)

Q. What did you do?

A. I gave orders to my crew to break out another preventer and another rope guy.

Q. What did you do with the preventer that broke and the rope guy that broke, did you keep them?

A. Yes.

Q. You kept them?

A. Yes.

Q. You, yourself kept them?

A. Yes.

Q. What have you done with the rope guy and the preventer since that time?

A. I don't understand you.

Q. What have you done with the rope guy and the preventer, since that time?

A. Oh, I got three foot pieces and give them to you.

Q. I will ask you some leading questions since it is hard for you to understand English.

A. Yes, it is hard to understand.

Q. Now, did you take the broken preventer and broken rope guy?

A. How is that. [112]

Q. Did you take the broken preventer and the broken rope guy?

A. Oh, yes, I take.

Q. Into your custody, into your custody?

A. Yes, I take.

Q. Then did you cut—

A. —Yes, three foot piece.

Q. Did you cut the preventer three feet back from each side of the break?

A. Yes, I cut.

Q. A section three feet long, on each side?

A. Yes.

(Deposition of John Kyriacos.)

Q. And you gave it to me?

A. Yes, I give it to you.

Q. Did you do the same thing with the rope guy?

A. Yes.

Q. What kind of preventer was it, that broke, will you describe it for me?

A. About three quarter inch diameter.

Q. Three quarters of an inch in diameter?

A. Yes.

Q. What kind was it, what kind of material?

A. Steel wire.

Q. How about the rope guy, what was it?

A. It was a rope——

Q. What is its description, was it an inch and a half manila rope? A. Yes, manila rope.

Q. Was it inch and a half rope?

A. Yes,—oh,—three inches circumference.

Q. Three inches circumference? A. Yes.

Q. And you have given that to me, also?

A. Yes, I give.

Q. Are you sure that the pieces that you have given me are from each side of where the preventer and the rope guy broke? A. Yes, I am sure.

Q. Was the preventer that broke, and the rope guy that broke, are they the customary size that is used for preventers and rope guys on these ships?

A. Yes.

Q. And the pieces that you have given me are from each side of where the preventer and the rope guy broke, are you sure of that? A. Yes.

(Deposition of John Kyriacos.)

Q. Now, in terms of age, what was the condition of the preventer and the rope guy?

A. The condition——

Q. Yes, they were in what condition, were they old?

A. No, not old.

Q. What were they?

A. I buy them, oh, I am not sure, I buy them——

Q. ——Are they new or old?

A. New.

Q. Had they ever been used before on the ship?

A. No, never.

Q. When was the preventer that broke, and the rope guy that broke, when were they put on that starboard boom?

A. Well,——

Q. How many days ago was it put on?

A. I don't understand you.

Q. Was it the day before the accident?

A. I don't understand exactly what you mean.

Q. Can you find the date there? Let the record show that the witness is now referring to his log book, to get the date.

A. The 4th, I put this on.

Q. The preventer and the guy rope?

A. Yes.

Q. On the starboard boom?

A. Yes.

Q. Both were put on brand new on the 4th?

A. Yes.

Q. At what time?

A. At four-thirty.

Q. In the afternoon?

A. Yes.

Q. When,—well, why did you put them on then, why was it necessary?

A. Because we broke the other one.

(Deposition of John Kyriacos.)

Q. The other one had broken? A. Yes.

Q. At the same boom? A. Yes.

Q. Who had put the preventer and the rope guy on the boom? A. I, myself.

Q. You did? A. Yes.

Q. Who had secured the preventer and the rope guy to the rail of the ship?

A. The longshoremen.

Q. Who, after you had secured the preventer and the rope guy to the end of the boom,—you secured them to the boom? A. Yes.

Q. Who, after you had secured the preventer and the rope guy to the end of the boom, who places the booms where they want them for loading?

A. It is about the same place now.

Q. Who does it? A. The longshoremen.

Q. How long are the booms at that hatch, how long are they? A. Well,—

Q. How many feet?

A. The boom is fifty-five feet.

Q. Fifty-five feet? A. Yes.

Q. Did you inspect this new preventer wire that broke when the man got hurt? A. Yes. [116]

Q. And did you inspect it before it was put on?

A. Yes.

Q. How did it look to you?

A. All right, O. K.

Q. Any breaks of any kind? A. No.

Q. Was it in good shape? A. Yes.

Q. Do you remember when the vessel came in here to Coos Bay? A. Yes.

(Deposition of John Kyriacos.)

Q. What was the date that the vessel came in to this dock? A. Well, what time,—

Q. What date,—what day.

A. February 3rd.

Q. February 3, 1955? A. Yes.

Q. And what time, about?

A. Oh, no,—the 4th, I have it here.

Q. What time?

A. At 8:55, no,—8:55 took pilot, and alongside it is about 11 o'clock, and at 1 o'clock the ship is ready for loading.

Q. Starting at 1 o'clock on the 4th?

A. Yes.

Q. And the preventer on the number 2 hatch broke the first time on the afternoon of the 4th?

A. Yes. [117]

Q. Is that right? A. Yes.

Q. And the second time, on the 5th, during the noon hour? A. Yes, yes.

Q. And that is when the longshoreman was hurt? A. Yes, yes.

Q. The same preventer? A. Yes.

Q. And the same rope guy broke too?

A. Yes, yes, the same.

Q. The same position, I mean, not the same rope guy? A. No, no, the same position.

Q. Did you have any cargo on your deck when the vessel came in here? A. Yes, cargo.

Q. What kind of cargo?

A. Wood, from Eureka, California.

Q. From Eureka? A. Yes.

(Deposition of John Kyriacos.)

Q. How high was your deck load?

A. Six feet.

Q. Did you have any upright stanchions supporting the deck load? A. Yes, yes.

Q. How high do they stand?

A. How high?

Q. Yes. A. About ten feet high. [118]

Q. Now, we are talking about the preventer and the rope guy that broke when the longshoreman was injured? A. Yes, yes, I understand.

Q. Did you have occasion to see how much strain was placed on the rope guy and the preventer prior to the accident?

A. Well, I don't understand.

Q. Do you know if they were equalized or not?

A. Yes, yes, equalized.

Q. I want to know whether or not the strain on the preventer and the rope guy was about the same, prior to the accident, equal strain on the rope guy and the preventer? A. Yes, normal.

Q. Did the longshoremen put it on?

A. Yes.

Q. Did they equalize the strain on the rope guy and the preventer? A. Yes.

Q. Is that the usual procedure when you are loading lumber? A. Yes, yes.

Q. When is your vessel going to leave Coos Bay?

A. Tomorrow or tomorrow——

Q. Sunday, do you mean?

A. Sunday or Monday.

Q. Is this a tramp steamer? A. Yes.

(Deposition of John Kyriacos.)

Q. And as far as you know you won't be coming back here again? A. No, no.

Q. Do you have a little trouble understanding English? [119] A. Yes.

Q. That is why I have been asking you some leading questions, did you understand the questions all right that I have asked you so far?

A. Yes, I understand.

Q. Up to now have you understood the questions that I have asked you?

A. Yes, I understand them.

Mr. Brooke: You may cross examine.

Cross Examination

Q. (Read by Mr. Pozzi): Now, you didn't see the accident? A. No.

Q. You were here in the saloon?

A. Yes, saloon.

Q. The first you know about it, the walking boss came in and told you? A. Yes.

Q. How long have you been the first officer of this vessel?

A. I am now between two years,—I am Chief Officer and Captain.

Q. For two years?

A. Yes, for the time being, and before, three years more.

Q. So all together, five years?

A. I am seven years as Captain, in all.

Q. Do you own an interest in this vessel, in this ship? A. What do you say? [120]

(Deposition of John Kyriacos.)

Q. Do you own an interest in this vessel?

A. I do not understand.

Q. Are you an owner of the ship? A. No.

Q. You are not an owner of the ship?

A. No, no, not owner.

Q. Now, this preventer wire that broke, where did you buy that wire?

A. I buy from Rotterdam, New Orleans, Antwerp,—I am not sure where.

Q. You are not sure which one of those ports you purchased the wire?

A. What do you say?

Q. I say do you know, you are not sure at which of those ports you purchased the wire?

A. No.

Q. How many hatches are forward, here?

A. Three.

Q. Three hatches? A. Yes, three.

Q. Do you have a boom for each hatch?

A. Yes.

Q. And you have a preventer wire and rope guy for each hatch? A. Yes, yes.

Q. What type of preventer wire do you have on Number 1 hatch? A. Steel wire rope.

Q. Wire rope? [121] A. Yes.

Q. What size is that wire?

A. Three quarter inch diameter, it is measured in diameter, steel wire and the rope is in circumference.

Q. And the preventer wire at number 1 hatch, has that been changed since this accident occurred?

(Deposition of John Kyriacos.)

A. No, no.

Q. It hasn't? A. No.

Q. Has the preventer on Number three been changed? A. Yes.

Q. When was that changed?

A. One day after we broke number 2.

Q. Why did you change the wire on number 3?

A. Because I say I am afraid if it is, well, you know, I say to my Boatswain to get it down and put one on.

Q. This wire that was replaced on number 3 hatch, is that a different type of wire than you put on number 2? A. No, not different.

Q. It is the same kind of wire?

A. Yes, yes.

Q. This wire that broke on number 2, when this fellow was hurt, where did it break?

A. What time.

Q. No, whereabouts, on the line, itself?

A. It is about three feet up above—about three feet. [122]

Q. It is tied to a cleat on the deck?

A. No, it is up from the deck, like this.

Q. It is tied to the bull rail? A. Yes.

Q. There is a pad eye there? A. Yes.

Q. Is there a similar pad eye on the number one and number 3 hatches? A. Yes.

Q. A similar pad eye? A. Yes.

Q. And it broke at the pad eye, did it?

A. Yes.

Q. It broke right there?

(Deposition of John Kyriacos.)

A. Yes, about three feet——

Q. ——You say it broke the day before too?

A. Yes.

Q. Where did it break on that day?

A. I do not remember, I don't remember if it is the same place or not.

Q. You don't know if it broke at the same place?

A. No, no.

Q. It could have been broken at the same place?

A. Yes.

Q. Was the wire that broke on the day before, and the wire that broke on the 5th,—do you understand? [123]

A. Yes, yes.

Q. Were they rigged the same way?

A. No, the one that broke the first day was an old one.

Q. The wire broke first on the 4th?

A. Yes.

Q. When you first came into port?

A. Yes, but that is not the same.

Q. Was that wire, the one that broke on the 4th, was it tied the same way as the one on the 5th?

A. Yes.

Mr. Brooke: Was it tied in the same way?

A. Yes.

Mr. Brooke: The same knots?

A. Yes.

Q. And this wire that broke and hurt this fellow, that was blocked around the pad eye?

A. Yes,—well, you see, this is like this and here is another and it pays from this way like this and

(Deposition of John Kyriacos.)

makes fast here, I don't know if you understand me.

Q. We can't get that in the record, are you saying that this preventer wire didn't go through the pad eye?

A. Through,—I think I can show you.

Mr. Brook: Let the record show that he is trying to draw how the preventer wire was attached.

Q. All right.

A. Here is this, like this and here is this. [124]

Q. That is a cleat? A. Yes.

Q. All right, go ahead.

A. And we went through here, and wrapped around the cleat here.

Q. Is the cleat forward of the pad eye?

A. Yes.

Q. And it goes through the pad eye first?

A. Yes, is about two feet from here to here, like this. This is the wire, passes through like this and made fast here.

Mr. Brooke: Was that the way it was rigged when the longshoreman got hurt?

A. Yes.

Mr. Brooke: Rigged that way?

A. Yes, this is the bull rail, it is about three feet above the deck.

Q. And this is the pad eye? A. Yes.

Q. Isn't that on the deck?

A. No, it is on the rail.

Q. Is the cleat on the rail too?

A. Yes, the same. This is the deck of the ship and this is up about three feet, about. This is the

(Deposition of John Kyriacos.)

rail and the same height is this one, and this one too.

Q. Are the preventer wires on number one and number three just the same as this? [125]

A. Not in the same place, another place, but the same as this one.

Q. The same way? A. Yes, yes.

Q. They were rigged the same way?

A. Yes, rigged.

Q. Now, the wire that broke—— A. Yes.

Q. The day you came into port? A. Yes.

Q. On the 4th? A. Yes.

Q. That was the same type of wire that you put back up there only this was new?

A. The same type yes, but not from the same coil.

Q. The same type of wire?

A. Yes, same type.

Q. Was that steel wire? A. Yes.

Q. Three quarters of an inch in diameter?

A. Yes, diameter.

Q. That was a soft type steel wire?

A. No, no, it is strong, it is hard.

Q. It is a hard type wire? A. Yes.

Q. That was the wire that broke when the fellow got hurt? [126] A. I don't understand.

Q. I say that was the wire that broke when this man got hurt? A. Yes.

Q. The preventer wire on number one, was that three quarters or five-eighths?

A. No, three quarters.

(Deposition of John Kyriacos.)

Q. You are sure it was three quarters?

A. Yes, the same.

Q. Did it come off the same coil?

A. No, not the same coil, no, not from the same coil.

Q. The wire on number three was from the same coil, was it? A. No.

Q. That was from a different coil?

A. Yes.

Q. But they were all the same type of wire.

A. Yes, diameter was three quarters.

Q. Do you ever use a different type of wire for preventer wires?

A. No, no, I explain, I buy coil of wire, that is about 120 fathoms. I cut for 35 fathoms each and make three runners, three runner wires, and the other I use for preventer. Why I am sure on that, it is the same size, the preventer and the runner.

Q. On the day that this fellow was hurt, the preventer wire and the runner wire were the same wire? A. Yes.

Q. The same size? [127]

A. Yes, and the same coil. And the same on the number two.

Q. Off of the same coil? A. Yes.

Q. Do you ever use any other size of wire?

A. Size, no, but type, yes, because I take it from American and English and Europe, but the size is the same.

Q. Do you ever use a soft wire?

(Deposition of John Kyriacos.)

A. Sometimes, sometimes they send a coil and I say I no want this one, give me another one.

Q. Sometimes you use soft and sometimes hard?

A. I explain that, in England they make hard, and American is soft.

Q. English is soft and American,—pardon me, English is hard and American is soft?

A. Yes, it is not the same.

Q. Was this soft or hard? A. Yes.

Q. Which was it?

A. Well, I don't understand.

Q. Was it soft or hard, the one that broke?

A. Soft, oh, no.

Q. It was hard? A. Yes, hard.

Q. Was that English wire?

A. I not remember, I buy from Rotterdam and Hamburg and New Orleans, and from New Orleans I am sure it is not, perhaps [128] London.

Q. You are sure it wasn't bought in New Orleans? A. No, not New Orleans.

Q. If it had been bought at New Orleans it would have been soft, probably? A. Yes.

Q. Can you get soft wire in Rotterdam, can you buy soft wire in Rotterdam? A. Perhaps.

Q. How do you know it was hard wire then?

A. If I make like this, you see.

Mr. Brooke: You test it with your hands?

A. Yes.

Q. You are sure this was hard wire?

A. Yes, hard.

Q. Do you ever use five-eighths inch wire?

(Deposition of John Kyriacos.)

A. No.

Q. You never use it?

A. Never in the runners.

Q. And never in the preventers?

A. No, I cut the three pieces for runners and the other piece I use for preventer, like I explain.

Q. Now, where is the little diagram that you made, thank you, now this cleat, is that forward or aft of the pad eye? A. This is forward.

Q. On number two hatch? A. Yes. [129]

Q. The cleat is forward? A. Yes.

Q. And the line ran down from the Boom?

A. Yes, down.

Q. And through the pad eye?

A. Yes, and it go this way.

Q. Forward to the cleat? A. Yes.

Q. It don't run back aft to the cleat?

A. No.

Q. Are the pad eyes and the cleats on number one hold the same way?

A. No, the other side, because the preventer, well,——

Mr. Brooke: At the number 1 hatch the booms are at the after end of that hatch? A. Yes.

Mr. Brooke: And at the number two they are at the forward end? A. Yes.

Mr. Pozzi: Then Mr. Todd, who was examining said "I would like to take a look at it,——

Mr. Pozzi: I don't think I have any more questions.

(Deposition of John Kyriacos.)

Redirect Examination

Q. (Read by Mr. Brooke): The preventer that broke, when the longshoreman was injured, you know what I mean? [130] A. Yes, yes.

Q. You have described it as a three quarter inch steel wire rope? A. Yes.

Q. How many strands in that preventer?

A. Six.

Q. In each strand are there smaller wires?

A. Twenty-four.

Q. Twenty-four smaller wires? A. Yes.

Q. The preventers, did you buy them?

A. Yes, from the,—from the—

Q. From the supply house?

A. Yes, the supply house.

Q. They are tested there? A. Yes.

Mr. Brooke: Let the record show that we are taking a short recess to go and look at the preventer wire and see how it is rigged.

No further questions.

Recross Examination

Q. (Read by Mr. Pozzi): Now, on the bull rail where the preventer wire for the number 2 boom was tied— A. Yes, yes.

Q. There is a cleat there? [131] A. Yes.

Q. There are pad eyes both forward and aft of the cleat? A. Yes.

Q. On the day that this accident occurred, through which pad eye was the preventer wire run, the one forward or the one aft of the cleat?

(Deposition of John Kyriacos.)

A. Listen, if the workmen want to put more, well, more starboard, they put forward this way. If they want to get more like this, they put from other side.

Q. When the wire broke——

A. From aft, like this.

Q. Did the preventer wire run through the pad eye that was aft? A. Yes.

Q. Aft of the cleat? A. Yes.

Q. And it ran from there to the cleat?

A. Yes.

Q. Did you go out and look at it before it was removed? A. Yes, yes, I look at it.

Q. It was still tied to the cleat when you saw it?

A. Yes.

Q. And it ran from the after pad eye forward to the cleat? A. Yes.

Q. Who rigged that?

A. The longshoremen.

Q. None of the crew had anything to do with that? [132]

A. No, no. Sometimes the longshoremen want it starboard more or port side more, sometimes in the middle when they want to work in the middle, and they change.

Q. The longshoremen change it? A. Yes.

Q. And not the crew? A. No.

Q. Now, you replaced the preventer wire on Number 2? A. Yes.

Q. This rope guy, that broke too? A. Yes.

(Deposition of John Kyriacos.)

Q. When it broke the first time did the rope break too? A. Yes.

Q. On the 4th? A. Yes.

Q. Now, you replaced the preventer wire on number two, did you replace that with a different type of wire than you had on there before?

A. I not understand.

Q. After it broke on the date that the man was injured, wait a minute, I am confused myself, it broke on the 4th? A. Yes.

Q. The first time? A. Yes.

Q. And you replaced it? A. Yes. [133]

Q. Did you use the same kind of wire?

A. No, because that was old wire, and I put new wire the second time.

Mr. Brooke: The preventer that broke the first time was an older wire? A. Yes, older.

Q. Was it soft wire? A. It was softer.

Q. It was a soft wire? A. Yes.

Q. The one that broke the first time?

A. Yes.

Q. Did you replace it with the same kind of wire?

A. No, because the new one, the new preventer—

Q. —The first one was softer than the second one? A. Yes.

Q. The first one was softer than the one that broke when the man was hurt?

(Deposition of John Kyriacos.)

A. Yes. I put the new one to make more stronger, but the stronger one break again.

Mr. Brooke: The second one was stronger?

A. Yes.

Mr. Brooke: It was stronger?

A. I am sure of that.

Mr. Pozzi: No further questions. [134]

Redirect Examination

Read by Mr. Brooke:

Q. Now, the wires that you have cut from the preventer? A. Yes, wires.

Q. They came from each side of the break?

A. Yes.

Q. And you have given those to me?

A. Yes.

Q. And the rope guy, the same? A. Yes.

Q. These are the preventer and the rope guy that were on the number two hatch? A. Yes.

Q. When the man was hurt? A. Yes.

Mr. Wood: Now, Your Honor, the rest of this covers the waiver of signature.

Mr. Wood: Before resting, Your Honor, we are still concerned about the other strand of this wire. It was last in Mr. Pozzi's office and we would like to know what the situation is on that.

Mr. Pozzi: Why are you concerned about it counsel?

Mr. Wood: I will state very frankly why we are concerned about it. There were three pieces of this

wire. Mr. Pozzi had three in his office and he [135] had produced two of them, and we think the inference is that he submitted the other for metalurgical examination by an expert, and he failed to call him, and we think that the usual inference is warranted in this case. That inference being that where a party has failed to produce a witness, the inference is that the evidence would not be of any help to him. That is really what we are driving at. I think Mr. Pozzi must have had that wire examined and that explains the absence of the other piece of wire.

The Court: You didn't ask him to produce it?

Mr. Pozzi: No, they did not.

Mr. Brooke: It was listed as a pre-trial exhibit, Your Honor, and it was understood that it would be here. It is generally understood that the parties will bring the exhibits to Court that are listed.

Mr. Pozzi: We listed the wire. I don't think that that makes any difference, they are trying to create some false impression here about a piece of wire. The pieces of wire were all inspected and I gave them to Mr. Brooke, he had his metallurgist look them over, the three pieces, that is in the record here and he is now trying to raise a smoke screen because he doesn't have a case. We had three [136] strands, pieces of three strands, that is correct. We did look them over, that is correct also. We did not run chemical analysis on all three strands, as is obvious. We took one of the three to look it over, that's all. We found out that you can't tell any-

thing, if counsel wants to know we found out that you can't tell that way. He knows it and I know it. It was not listed as three pieces of wire, that I know of, let's see what is listed here,—no, it was not listed. They have given no notice to produce here, and they could have made certain that we would have brought it in.

The Court: There is nothing for the Court to pass on.

Mr. Brooke: What was that, your Honor?

The Court: There is nothing for the Court to pass on.

Mr. Brooke: It is certainly listed as a pretrial exhibit.

Mr. Pozzi: It is not,—are you calling me a liar in Court, you point out where it is listed.

Mr. Brooke: It is listed there as wire cable.

Mr. Pozzi: There are two pieces of wire cable listed, and two pieces have been produced.

Mr. Brooke: May I check and see if our exhibits are all in, your Honor?

The Court: Yes, you may.

Mr. Brooke: If your Honor please, the plastic sections, as prepared by the metalurgist, have not [137] been listed as pretrial exhibits.

The Court: They were admitted.

Mr. Brooke: Yes, but they should be recorded in the Pretrial Order as Exhibit Number 12.

Having read the deposition of Mr. Kyriacos into the record, we do ask that the deposition be made a part of the record.

The Court: It is already in the record, but it may be admitted as an exhibit if you desire.

Mr. Brooke: With that your Honor, the respondent rests.

The Court: Do you have any rebuttal?

Mr. Pozzi: Just about two questions from a witness.

The Court: Very well, you may proceed.

GLEN TITUS

Called as a witness in rebuttal by the libellant, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Pozzi): You heard the testimony of Captain Larsen concerning the doubling up of the winches? A. Yes, I did.

Q. What is the purpose of doubling up the winches?

A. So they will run slower and smoother. [138]

Q. Can you jerk the winches when they are doubled up?

A. Not the American Liberty, the original winches.

Q. Was this the original winch? A. Yes.

Mr. Pozzi: That's all.

Mr. Brooke: Nothing further of this witness.

Mr. Pozzi: With that the Libellant rests. I would like an opportunity to argue this matter orally before your Honor.

Mr. Wood: I think, your Honor, we would like to call Captain Larsen for one question, I am a

little uncertain as to what Captain Larsen testified on cross examination. If he said on cross examination that you can jerk the gear with the winches in double gear or doubled up, then, of course, he has already testified to it.

Mr. Pozzi: That is what he testified to.

The Court: My recollection is that he testified to that.

Mr. Brooke: As long as the record is clear on that we have no surrebuttal.

Mr. Pozzi: He has already testified that you can.

The Court: Now, I understand that both sides rest?

Mr. Pozzi: That's right, your Honor, we rest.

Mr. Brooke: And we have rested.

The Court: Very well, then we will recess at this time, and we will meet at two o'clock.

2 O'Clock P.M.

(Argument of counsel not reported.)

(Case submitted.) [140]

[Endorsed]: Filed June 10, 1957.

[Endorsed]: No. 15592. United States Court of Appeals for the Ninth Circuit. Glen Titus, Appellant, vs. Madam Cadio G. Sigalas, et al., owners and Pacific Atlantic Steamship Company, charterer of the SS Santorini, etc., Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: June 17, 1957.

Docketed: June 20, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15592

GLEN TITUS,

Libelant,

vs.

SS SANTORINI, her engines, tackle and gear, and
all persons claiming any interest therein, and
MADAM CADIO G. SIGALAS, et al., owners,
and PACIFIC ATLANTIC STEAMSHIP
COMPANY, charterer, Respondents,

SIGALAS AND KULUKUNDIS, Claimant.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD TO BE PRINTED

Comes now libelant-appellant pursuant to Rule 17

(6) of the rules of this court, and makes the following:

Statement of Points

I.

That the findings of fact made by the Honorable Chase A. Clark, Judge of the United States District Court for the District of Idaho, after trial of this cause below at Portland, Oregon, were not supported by the evidence received upon said trial.

II.

That the conclusions of law made by the Honorable Chase A. Clark, Judge of the said District Court, after trial of this cause below have no basis in fact by reason of the matter stated in point I above.

III.

That the Honorable Chase A. Clark, Judge of said Court, should have adopted and entered the findings of fact and conclusions of law proposed by libelant after trial of this cause below.

IV.

That the decree made and entered by the Honorable Chase A. Clark, Judge of said District Court, was based upon erroneous findings of fact and conclusions of law, was not supported by the evidence received upon trial of this cause below and was erroneous in dismissing the libel and in denying to libelant recovery of special and general damages.

V.

That the issues of fact and law raised by the libel in rem and in personam with foreign attachment

and respondents' and claimant's answer thereto as set forth in the contentions of the parties in the pre-trial order should be tried de novo by this Court upon the record designated as follows:

Designation of Record to Be Printed

Style of the Court.

Names of the Parties, to-wit: Glen Titus, Libelant-Appellant vs. SS Santorini, her engines, tackle and gear, and all persons claiming any interest therein, and Madam Cadio G. Sigalas, et al., owners, and Pacific Atlantic Steamship Company, charterer, Respondents, Sigalas and Kulukundis, Claimant.

Libel in rem and in personam with foreign attachment.

Answer.

Order dated April 18, 1955.

Pretrial order.

Order allowing time to file briefs.

Record of trial on January 17, 1956.

Libelant's brief.

Opinion of Judge Clark.

Proposed findings of fact and conclusions of law (not filed).

Proposed decree (not filed).

Objections and amendments to respondents' proposed findings of fact and conclusions of law.

Letter dated March 1, 1957.

Findings of fact and conclusions of law.

Decree.

Notice of appeal.

Bond for costs on appeal.

Order extending time to docket appeal.

Designation of record on appeal.

Order to forward exhibits to Court of Appeals.

Supplemental designation of record by claimant.

Transcript of docket entries.

Clerk's certificate (including transcript of testimony).

Libelant's proposed findings of fact and conclusions of law and libelant's proposed decree have been forwarded to this Court but were not a part of the record proper because of the failure and refusal of the Honorable Chase A. Clark, Judge of said District Court, to adopt said findings of fact and conclusions of law and to make said proposed decree. It is libelant's request and desire, however, that said proposed findings of fact and conclusions of law and said proposed decree be printed because same are necessary to permit this Court to consider properly the record herein and to consider this appeal.

Respectfully submitted,

PETERSON, POZZI & LENT,
/s/ By RALPH N. DUNCANSON.

Certificate of Service Attached.

[Endorsed]: Filed June 20, 1957. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF DESIGNATION OF RECORD TO BE PRINTED SUBMITTED BY CLAIMANT-APPELLEE

Comes now Claimant-Appellee, and for its Supplemental Designation of Record to be printed, designates as follows:

I.

An Order signed by the United States District Court for the District of Oregon on April 18, 1955, and filed April 21, 1955.

Respectfully submitted,

WOOD, MATTHIESSEN, WOOD &
TATUM,

/s/ JOHN R. BROOKE,

Attorneys for Claimant-Appellee.

Certificate of Service Attached.

[Endorsed]: Filed June 24, 1957. Paul P. O'Brien,
Clerk.

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Original Articles	101
The Treatment of Acute Appendicitis	101
The Treatment of Chronic Appendicitis	102
The Treatment of Acute Cholecystitis	103
The Treatment of Chronic Cholecystitis	104
The Treatment of Acute Pancreatitis	105
The Treatment of Chronic Pancreatitis	106
The Treatment of Acute Duodenitis	107
The Treatment of Chronic Duodenitis	108
The Treatment of Acute Gastritis	109
The Treatment of Chronic Gastritis	110
The Treatment of Acute Colitis	111
The Treatment of Chronic Colitis	112
The Treatment of Acute Proctitis	113
The Treatment of Chronic Proctitis	114
The Treatment of Acute Hemorrhoids	115
The Treatment of Chronic Hemorrhoids	116
The Treatment of Acute Fissures	117
The Treatment of Chronic Fissures	118
The Treatment of Acute Abscesses	119
The Treatment of Chronic Abscesses	120
The Treatment of Acute Sinusitis	121
The Treatment of Chronic Sinusitis	122
The Treatment of Acute Otitis	123
The Treatment of Chronic Otitis	124
The Treatment of Acute Rhinitis	125
The Treatment of Chronic Rhinitis	126
The Treatment of Acute Sinusitis	127
The Treatment of Chronic Sinusitis	128
The Treatment of Acute Otitis	129
The Treatment of Chronic Otitis	130
The Treatment of Acute Rhinitis	131
The Treatment of Chronic Rhinitis	132
The Treatment of Acute Sinusitis	133
The Treatment of Chronic Sinusitis	134
The Treatment of Acute Otitis	135
The Treatment of Chronic Otitis	136
The Treatment of Acute Rhinitis	137
The Treatment of Chronic Rhinitis	138
The Treatment of Acute Sinusitis	139
The Treatment of Chronic Sinusitis	140
The Treatment of Acute Otitis	141
The Treatment of Chronic Otitis	142
The Treatment of Acute Rhinitis	143
The Treatment of Chronic Rhinitis	144
The Treatment of Acute Sinusitis	145
The Treatment of Chronic Sinusitis	146
The Treatment of Acute Otitis	147
The Treatment of Chronic Otitis	148
The Treatment of Acute Rhinitis	149
The Treatment of Chronic Rhinitis	150
The Treatment of Acute Sinusitis	151
The Treatment of Chronic Sinusitis	152
The Treatment of Acute Otitis	153
The Treatment of Chronic Otitis	154
The Treatment of Acute Rhinitis	155
The Treatment of Chronic Rhinitis	156
The Treatment of Acute Sinusitis	157
The Treatment of Chronic Sinusitis	158
The Treatment of Acute Otitis	159
The Treatment of Chronic Otitis	160
The Treatment of Acute Rhinitis	161
The Treatment of Chronic Rhinitis	162
The Treatment of Acute Sinusitis	163
The Treatment of Chronic Sinusitis	164
The Treatment of Acute Otitis	165
The Treatment of Chronic Otitis	166
The Treatment of Acute Rhinitis	167
The Treatment of Chronic Rhinitis	168
The Treatment of Acute Sinusitis	169
The Treatment of Chronic Sinusitis	170
The Treatment of Acute Otitis	171
The Treatment of Chronic Otitis	172
The Treatment of Acute Rhinitis	173
The Treatment of Chronic Rhinitis	174
The Treatment of Acute Sinusitis	175
The Treatment of Chronic Sinusitis	176
The Treatment of Acute Otitis	177
The Treatment of Chronic Otitis	178
The Treatment of Acute Rhinitis	179
The Treatment of Chronic Rhinitis	180
The Treatment of Acute Sinusitis	181
The Treatment of Chronic Sinusitis	182
The Treatment of Acute Otitis	183
The Treatment of Chronic Otitis	184
The Treatment of Acute Rhinitis	185
The Treatment of Chronic Rhinitis	186
The Treatment of Acute Sinusitis	187
The Treatment of Chronic Sinusitis	188
The Treatment of Acute Otitis	189
The Treatment of Chronic Otitis	190
The Treatment of Acute Rhinitis	191
The Treatment of Chronic Rhinitis	192
The Treatment of Acute Sinusitis	193
The Treatment of Chronic Sinusitis	194
The Treatment of Acute Otitis	195
The Treatment of Chronic Otitis	196
The Treatment of Acute Rhinitis	197
The Treatment of Chronic Rhinitis	198
The Treatment of Acute Sinusitis	199
The Treatment of Chronic Sinusitis	200

No. 15594

United States
Court of Appeals
for the Ninth Circuit

MILTON MAYER,

Appellant,

vs.

ERNEST WRIGHT, Regional Commissioner of Internal Revenue Service and HAROLD HAWKINS, District Director of Internal Revenue Service,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

AUG 21 1957

PAUL P O'BRIEN, CLERK

No. 15594

United States
Court of Appeals
for the Ninth Circuit

MILTON MAYER,

Appellant,

vs.

ERNEST WRIGHT, Regional Commissioner of Internal Revenue Service and HAROLD HAWKINS, District Director of Internal Revenue Service,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

Affidavit of Francis Heisler	43
Appeal:	
Certificate of Clerk to Transcript of Record on	50
Cost Bond on	48
Designation of Record on (USCA).....	53
Notice of	48
Statement of Points Relied Upon by Appellant on (USCA)	52
Certificate of Clerk to Transcript of Record ...	50
Complaint for Declaratory Judgment and for Injunction	3
Exhibit A—Article in Saturday Evening Post, Oct. 7, 1939, "I Think I'll Sit This One Out"	23
Exhibit B—Article in Christian Century, July 12, 1944, "Conscience and the Common- wealth"	25
Exhibit C—Second Installment of "Conscience and the Commonwealth," July 19, 1944....	29

ii.

Complaint—(Continued):

Exhibit D—Article in The Commonweal, Oct. 23, 1953, "Sit This One Out?".....	32
Exhibit E—U. S. Treasury Dept. Notice to Milton S. Mayer, Oct. 21, 1953.....	35
Exhibit F—Warrant of Distrainment dated April 1954	36
Exhibit G—Copy of Letter, May 29, 1954, Milton Mayer to Director of Internal Revenue	37
Exhibit H—Copy of Letter, Aug. 15, 1954, to Commissioner of Internal Revenue.....	38
Exhibit I—Copy of Letter, Nov. 3, 1954, to Internal Revenue Service.....	41
Exhibit J—Collection Officer's Receipt for Taxes, Jan. 9, 1955.....	43
Cost Bond on Appeal.....	48
Designation of Record on Appeal (USCA).....	53
Names and Addresses of Counsel.....	1
Notice of Appeal.....	48
Notice of Motion to Dismiss.....	46
Order Dismissing Cause.....	47
Order to Show Cause and Temporary Restraining Order	45
Statement of Points Relied Upon by Appellant (USCA)	52

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STATE OF NEW YORK

IN SENATE

JANUARY 1, 1891

REPORT

OF

THE

COMMISSIONERS

OF THE LAND OFFICE

IN RESPONSE TO A

RESOLUTION

PASSED

APRIL

1889

ALBANY:

W. H. BROWN,

PRINTERS.

1891.

In the United States District Court, Northern
District of California, Southern Division

No. 36066

MILTON MAYER,

Plaintiff,

vs.

ERNEST WRIGHT, REGIONAL COMMIS-
SIONER OF INTERNAL REVENUE
SERVICE and HAROLD HAWKINS, DIS-
TRICT DIRECTOR, INTERNAL REVE-
NUE SERVICE, Defendants,

COMPLAINT FOR DECLARATORY JUDG-
MENT AND FOR INJUNCTION

Plaintiff Complains of Defendants, and Each of
Them, and for Cause of Action Says:

(1) This cause of action is brought under the laws and the Constitution of the United States; the Declaratory Judgments Act (28 U.S.C.A. Sec. 2201-2); the Injunction Act (28 U.S.C.A. Sec. 272 (a) and 3653(b)). This cause of action arises particularly under the First Amendment to the Constitution of the United States and also under Title 32, National Defense Chapter XVI, Selective Service System, Part 1622.14 (32 CFR Sec. 1602, et seq.), and under the Universal Military Training and Service Act (50 App. U.S.C.A. Sec. 451 et seq.).

(2) The jurisdiction of this Court is invoked in accordance with the Constitution of the United

States and in accordance with Title 28, U.S.C.A. Sec. 1431, et seq.

(3) Plaintiff is a citizen of the United States and a citizen and resident of the State of California, residing in that state in Monterey County, Carmel, California.

(4) The defendant Ernest Wright is sued in his official capacity as Regional Commissioner of Internal Revenue Service, San Francisco Region, with offices in the City of San Francisco, in said state, at 870 Market Street.

(5) The defendant Harold Hawkins is sued in his official capacity as District Director of Internal Revenue Service, with offices in the City of San Francisco, in said state, at 100 McAllister Street.

(6) A controversy exists between plaintiff and the Government of the United States as regards plaintiff's rights and other legal relations arising under the Constitution of the United States and the various statutes and laws hereinabove referred to, which statutes and laws were adopted pursuant to said Constitution of the United States.

(7) Plaintiff is, because of religious training and belief, conscientiously opposed to participation in war or in military preparation. Plaintiff's conscientious objection to war and to military preparation dates back many years, emanating from his belief in a Supreme Being. He has given expression to his conscientious objection to war and to military preparation, both orally and in writing, for the last sixteen (16) years or more.

(a) In the October 7, 1939 issue of the Saturday Evening Post, he expressed his unwillingness to participate in the oncoming war (said article was written before the outbreak of the Second World War, but was printed after the outbreak thereof). Said article was entitled "I Think I Will Sit This One Out," as it will more fully appear from the photostatic copy of the caption of said Saturday Evening Post article, hereto attached as Exhibit "A" and made part of this complaint.

(b) Plaintiff expressed his position as a conscientious objector to war in an article entitled "Conscience and the Commonwealth" in Vol. LXI, No. 28 of The Christian Century, dated July 12, 1944, as it will more fully appear from the photostatic copy of the first page of said article hereto attached as Exhibit "B" and made part of this complaint.

(c) The second installment of said article "Conscience and the Commonwealth" appeared in Vol. LXI, No. 29 of The Christian Century, dated July 19, 1944, as it will more fully appear from the photostatic copy of the first page of said article attached hereto as Exhibit "C" and made a part of this complaint.

(d) Plaintiff expressed his continued opposition to war and any participation on his part in military preparation in an article entitled "Sit This One Out?", which appeared in Vol. LIX, No. 3 of The Commonweal, dated October 23, 1953, as it will more fully appear from the photostatic copy of

page 1 of said article hereto attached as Exhibit "D" and made part of this complaint.

(8) Plaintiff did take a pacifist position in 1939 and became then and remained a conscientious objector to war and to military preparation. He has attended, since about 1940, Meeting for Worship of the Religious Society of Friends (Quakers) regularly, first in Chicago, then in Marburg, Germany, and later in Carmel, California. He was and is an active participant in these Friends Meetings and took—whenever called upon by other participants in the Meeting—official duties in them. It was recognized by leading Friends of the country that plaintiff's lectures, articles, and publications expressed the Friends' pacifist position and therefore he was called upon, about 1940, and did lecture regularly thereafter for the American Friends Service Committee (Quaker) in various parts of this country and in Europe. In such lectures plaintiff expressed the historic Quaker opposition to all war.

(9) Plaintiff was and is a member of the Board of the Jewish Peace Fellowship, and is a member of the Fellowship of Reconciliation, both religious pacifist organizations, the latter with affiliates in various parts of the world. Plaintiff served on the National Board of the Fellowship of Reconciliation.

(10) Plaintiff joined the Peacemakers, an absolute pacifist organization, which organization came into being in 1948. As such member he joined in all the public assertions of the Peacemakers and their opposition to war, and to military prepara-

tion, and together with other members of the Peacemakers and in witness to his conscientious objection to war in any form, did return his Selective Service Classification Card to the President of the United States, with the statement that for sake of conscience, he was unable to carry or possess the same.

(11) In the early part of the Second World War, on or about the year 1941, plaintiff was called upon by his Local Selective Service Board to complete his statement, which he did, and claimed thereon a conscientious objector status; however, his claim as to conscientious objector classification was denied by his Local Board, and thereupon the plaintiff informed said Board that if called upon to serve in the Armed Forces, either as a combatant or as a noncombatant, he would be unable to do so because of his conscientious objection to the war and to military preparation in any form.

(12) Plaintiff, having reached the age beyond which the Selective Service System has no jurisdiction upon the citizens of this country (50 U.S.C.A. App. (Supp. V) Par. 456(j) et seq.), felt constrained in conscience to continue to refuse to participate in war or in military preparation in any form. Therefore he informed the Internal Revenue Service of his inability in conscience to pay that part of his Federal Income Tax which, in accordance with the budget of the United States, adopted by Congress, was to be used for purposes of war or military preparation.

(a) In 1948 he first so refused to contribute to war or military preparation by opposing the payment of the military portion of his taxes, and he so wrote to the President of the United States.

(b) In January, 1953, while a resident of the City of Chicago, County of Cook, State of Illinois, he wrote to the Collector of Internal Revenue, stating the reasons why he was unable to pay his taxes in full, and why he was compelled as a conscientious objector to war and military preparation to withhold the payment of that part of his Federal taxes that were budgeted to be expended for war purposes. His statement to said Collector of Internal Revenue was as follows:

"I attach herewith my U. S. Individual Income Tax Return for Calendar Year 1952, together with my check, in payment of 50% of the tax claimed due, in the amount of \$99.38.

I attach herewith also my Declaration of Estimated Income Tax for Calendar Year 1953, together with my check, in payment of the first of four equal installments on my estimated 1953 Income Tax, in the amount of \$50.00.

On July 13, 1952 I wrote Mr. John B. Dunlap, Commissioner, in correspondence under his file IT:A:MLS-F1.10-C, explaining that the 1952 forms sent me to my Chicago address, and forwarded to me in Europe, did not include Form 1040-ES, Declaration of Estimated Income Tax for Calendar Year 1952. I explained further that I was therefore unable to file such Declaration and asked Mr. Dun-

lap to send me said Form. This Form was duly sent me, in Germany, but did not reach me until December 26, 1952. It was mailed from Chicago November 3, 1952, and was forwarded to me from Germany. My filing my 1952 Income Tax Return today appears to obviate the necessity for filing Form 1040-ES for 1952.

With reference to the payment, attached, of \$99.38 of the amount claimed due, \$198.76, as my 1952 Income Tax, I respectfully observe that I can not, as a conscientious objector, on religious grounds, to military service, perform the military service here asked of me—the purchase of armaments. Nor, as a loyal American, can I contribute to the militarization of my country and, through its militarization, to the ruin which has overtaken every democracy which has ever taken this course. I do not defy my Government; I accept gladly my obligation to maintain its free and peaceful institutions however large a share of my earnings they require. If you will inform me of any means whereby I may do so through payment to the Treasury Department, I shall immediately remit such payment in the amount of the balance claimed due in Income Tax for 1952. Meanwhile, and without repudiating the obligation asserted in the preceding sentence, I am remitting, in two equal parts, an amount equal to the balance claimed due, to two private agencies, the Fellowship of Reconciliation and the American Friends Service Committee, which, in the Government's own view, are serving our country's free and peaceful institutions. I do not wish to contend with my Gov-

tioned nearest Carmel, California, where I must be for the next several months. Can this be arranged? Chicago remains my place of permanent residence.

I am sorry to trouble you in this matter, and I hope that this letter will explain my non-appearance at your office on November 10 for the conference requested in your notice of November 3."

(g) Plaintiff received from the District Director of the Internal Revenue Service in Chicago, a letter dated December 9th, in which said District Director accepted plaintiff's statement that his refusal to pay that part of his income taxes which were to be used for war purposes were based on his conscientious objection to the war effort in any form; however, said District Director informed plaintiff that "the law provides no relief from payment of the tax on such grounds", and he claimed to have no alternative but to proceed with the collection against plaintiff.

(h) On January 8, 1954, plaintiff was informed that pursuant to his request the matter pertaining to the collection of parts of his income tax were being transferred to the District Director in California.

(i) Thereafter, a Warrant of Distraint was issued against plaintiff from the Director of Internal Revenue from its Salinas, California office, according to which a claim was made against the plaintiff for unpaid balance of his taxes in the amount of \$32.78, plus interest thereon to May 30, 1954, amounting to \$2.50, for a total of \$35.28, as will

more fully appear from the photostatic copy of a Notice of Warrant of Distrainment which is attached hereto as Exhibit "F" and made part of this complaint.

(j) On May 29, 1954, plaintiff wrote to the Director of Internal Revenue at its Salinas, California office, in accordance with photostatic copy of said letter hereto attached as Exhibit "G" and made part of this complaint. In said letter plaintiff claimed that the matter of nonpayment of certain parts of his income tax used for war purposes is that of principle, and he requested that the execution of the Warrant be postponed until he was enabled to present a brief to the Commissioner of Internal Revenue in support of his position.

(k) On August 15, 1954, the plaintiff presented such a brief to the Commissioner of Internal Revenue Service in Washington, D. C., in accordance with the photostatic copy thereof hereto attached as Exhibit "H" and made a part of this complaint. In this brief the plaintiff stated *inter alia*:

"I am a conscientious objector to participation in war, and have been publicly identified as such since 1939. I have come to the conclusion that I can not, in conscience, and in love of my country, encourage my country's government to spend my country's substance in the killing of my innocent fellow-men anywhere, or in preparation for killing them, or in preparing my fellow-Americans of military age to kill and to be killed.

I have stated and argued my position publicly on

many occasions, and on many occasions published it. One of the recent occasions was in *The Commonwealth*, an American religious (Roman Catholic) weekly periodical, in its issue of October 23, 1953, under the title, *Sit This One Out?* I attach a copy of the published article as a part of this brief.

The \$32.78 plus \$2.50 interest claimed by the Internal Revenue Service in the present matter represents 50% of the balance due, as of March 15, 1953, of my 1952 income tax. I withheld 50% of the amount claimed on the basis that at least 50% of my income tax is used for purposes, which I can not in conscience support. (The percentage so used is, while difficult to determine exactly, actually much larger than 50.)”

(1) Plaintiff thereupon requested that the Government of the United States

“make it possible for me to pay the full amount of my income tax in conscience. I wish to pay the amount claimed, and any and all other amounts my government may claim, for any and all purposes which I can recognize, in simple conscience, as consistent with or conducive to the general welfare. If the amount claimed here can be so paid in, and so used, I shall pay it not only voluntarily, but gladly.

Until this protest of mine can be resolved, either by my government's allowing me to pay the full amount of my taxes for purposes of the general welfare, or by legal proceedings in which I may challenge my government's right to tax me against

my conscientious and religious precepts, I urge you to withhold execution of the warrant for distraint * * *

(m) On September 2, 1954, plaintiff received from the United States Treasury Department, Washington 25, D. C., a letter in answer to his brief of August 15, 1954, in which the Treasury Department stated that while it

“* * * appreciates the sincerity of your views in this matter, the federal income tax laws enacted by the Congress of the United States apply uniformly to every individual bound by citizenship or residence to the laws of this country * * *

(n) Plaintiff was again informed that no relief can be granted to him in this matter notwithstanding his conscientious objection, and was further informed that the tax liability matter was within the jurisdiction of the District Director of the Internal Revenue of San Francisco, one of the defendants herein.

(o) Plaintiff was informed through the Monterey office of the District Director of Internal Revenue of San Francisco, that proceedings would be had against him unless he paid the amount of the unpaid taxes mentioned in said Notice of Warrant of Distraint, Exhibit “F”, and therefore, he wrote to said Monterey office of the District Director of Internal Revenue, one of the defendants herein, on November 3, 1954, as it more fully appears from the photostatic copy of said letter hereto attached as Exhibit “I” and made a part hereof. In said

letter (Exhibit "I") plaintiff wrote, among others,

"I am sorry that I can not now bring myself voluntarily and in conscience, to support war or an armaments race which, if it follows the course of every armaments race in human history, will end in war."

"* * * I may add that I am and always have been and will be, I hope, a loyal and patriotic citizen of that nation whose motto is, 'In God We Trust.' "

"* * * I want to say that I do not dispute the amount or computation of the tax, and that I believe in progressive income taxation of whatever degree necessary for the good of my country and its citizens."

"* * * My hope remains that my Government can and will find a way in which I may be allowed in conscience to pay whatever taxes it claims. Our statesmen and our people all profess their attachment to peace, and I am sure that they do so sincerely. Sharing their view, I know of no way to support it better than to pay my taxes for peaceful purposes."

(13) Plaintiff received no relief from the United States Treasury Department, nor from the District Director of Internal Revenue, San Francisco, one of the defendants herein, but to the contrary, said defendant having obtained from plaintiff information as to the names and addresses of any of his employers and the amount of any fees or emoluments due to him for such employment, proceeded

to collect the amount of plaintiff's unpaid income tax for 1952 that was withheld by him because of his conscientious objection of the use thereof for war purposes, and did collect on March 4, 1955, the sum of \$36.55 (the difference herein and the amount of said Notice of Warrant of Distrain, Exhibit "F", represents additional interest) as it more fully appears from the said voucher showing and receipt acknowledging payment, photostatic copy of which is hereto attached as Exhibit "J" and made a part hereof.

(14) Plaintiff alleges that the action of the defendant Harold Hawkins, District Director Internal Revenue Service, which action was approved by Ernest Wright, Regional Commissioner of Internal Revenue Service, defendant herein, is contrary to the Constitution of the United States and the laws and statutes made pursuant thereto for the following reasons:

(a) The First Amendment to the Constitution of the United States provides that

"Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

Plaintiff claims that defendants' coercive action collecting from him taxes to be paid for war purposes when plaintiff, because of religious training and belief conscientiously objects to participation in war and military preparation in any form, prohibits plaintiff's free exercise of his religion.

(b) Congress must and did recognize the purport of the First Amendment to the Constitution of the United States which enjoins it from making laws prohibiting the free exercise of religion when it enacted the Universal Military Training and Service Act (50 App. U.S.C.A. Sec. 451 et seq.) and therein gave recognition to the free exercise of religion by those who for sake of conscience were unable to participate in war in any form. Pursuant to such recognition conscientious objectors were exempted from participation in military service.

As a conscientious objector, plaintiff claims that since he is not now of draft age, he ought to be given the same recognition as conscientious objectors of draft age, and he ought to be exempted from contributing to war and to military preparation by exempting him from payment of that part of his income tax that is used for the purposes of war, preparation for war and the reparation caused by war. Failure to give plaintiff such exemption would make the Universal Military Training and Service Act (50 App. U.S.C.A. Sec. 451 et seq.) and that part thereof which pertains to exemption of draft age conscientious objectors, class legislation forbidden by the Constitution of the United States.

(c) The decisions of the various federal courts interpreting the Universal Military Training and Service Act (50 App. U.S.C.A. Sec. 451 et seq.) as it pertains to conscientious objectors, consider the history of claimants for conscientious objector's

status, and in such cases claimants' contribution to war in any substantial form caused them to be deprived of their conscientious objectors' status.

Plaintiff, were he to submit to the coercion of the defendants and pay that part of his income tax that is expended for the purposes of war, would endanger his claim to the status of a conscientious objector, and he would be compelled, if drafted, to participate in a war contrary to his conscience and in violation of the First Amendment to the Constitution of the United States.

(d) Plaintiff at the present is beyond the statutory age limit under which male citizens of this country may be drafted into the Armed Forces of the United States. Such age limit may at the pleasure of Congress be changed any time, and therefore, plaintiff is not for all times exempted from call to military service. If plaintiff were to be successfully coerced by the defendants to pay that part of his income tax that is used for the furtherance of war, he would be deprived at this time and also in the future from claiming the status of conscientious objector. In case Congress shall choose to extend the age limit of draftees so as to include plaintiff within such age limit, he would be compelled to participate in war contrary to his religious training and belief, contrary to his conscience, and contrary to the First Amendment to the Constitution of the United States.

(15) Plaintiff states that he is entitled to a declaratory judgment declaring that in accordance

with the Constitution of the United States and the laws and statutes enacted pursuant thereto, and particularly because of his long-standing and conscientious objection to war in any form, he is to be exempted from the payment of that part of his income tax assessed against him which is expended for the furtherance of past, present and future war efforts.

(16) (a) Plaintiff is entitled to an injunction directed against the defendants herein restraining them in the future from levying upon, seizing, or selling any of plaintiff's property under any Warrant for Dstraint, lien, or other process for the collection of that part of his assessed tax subsequent to the year of 1952, that is budgeted for war or for military preparation.

(b) In the alternative, plaintiff is entitled to a declaration by this Court, that 50% of his 1952 taxes, now expended for war and for military preparation and that part of his taxes for subsequent years that are budgeted for war purposes, be placed in the General Funds of the United States to be expended solely for peaceful purposes.

Wherefore, plaintiff prays:

1. That the rights and legal relations of the plaintiff under the Constitution of the United States and statutes and laws enacted pursuant thereto, particularly as regards the payment of that part of his Federal Income Tax that is expended for past, present, and possible future wars, be declared.

2. That this Court declares that the above named defendants, and each of them, having unlawfully collected from plaintiff the sum of \$36.55 as shown on Exhibit "J", and the sum of \$66.60 as shown on Exhibit "E", for a total of \$103.15, be ordered to refund the same to plaintiff with interest thereon from the date of the seizure thereof.

3. The defendants Ernest Wright, Regional Commissioner of Internal Revenue Service and Harold Hawkins, District Director, Internal Revenue Service, and deputies, agents, employees, and officials of the Director of Internal Revenue and the Treasury Department be permanently enjoined and restrained from levying upon, seizing, or selling any of plaintiff's property under any Warrant for Distrainment or other process for the collection of that part of plaintiff's Federal income tax for the years subsequent to 1952 that is budgeted for war purposes.

4. Upon final hearing it be ordered and adjudged:

(a) that the tender of 50% of the amount of the 1952 income tax assessed against the plaintiff upon the conditions above expressed, is in discharge of any and all of his liability on account of and with respect to his 1952 income tax.

(b) that the assessment of 100% of plaintiff's income tax for 1952 is invalid and illegal to the extent of 50% thereof, and the lien and Warrant of Distrainment issued for the collection thereof to the extent of 50% thereof be cancelled, vacated, and set aside.

(c) that an order to show cause be issued out of this Honorable Court directing the defendants, at a time and place to be therein specified, to show cause why the injunctive relief herein prayed for should not be granted Pendente Lite; and that when the hearing is held upon said order to show cause, the defendants, their agents, servants, employees, and others acting under their control and direction by virtue of their orders, be temporarily restrained without notice, as it is herein prayed they be permanently enjoined.

5. In the alternative that this Court orders and adjudges that 50% of plaintiff's 1952 taxes that were budgeted and expended for war and military purposes, and such parts of his Federal income tax assessed for the years subsequent to 1952 that are budgeted for war and military preparation, be placed in the General Funds of the Treasury of the United States to be expended solely for peaceful and constructive purposes.

6. And plaintiff prays for such further relief as equity meets and justice requires.

Dated: December 6, 1956.

HEISLER & STEWART,

By

Francis Heisler,

Attorneys for Plaintiff.

Duly Verified.

EXHIBIT "A"

The Saturday Evening Post, October 7, 1939
I Think I'll Sit This One Out—By Milton S. Mayer

Editor's Note—Mr. Mayer, who here speaks for himself, is assistant to the president of the University of Chicago. Just turned thirty-one, he is well to the Left, yet in rebellion against the prevailing international romanticism of American radicals. His article was written two weeks before the outbreak of war and then called I Think I'll Sit the Next One Out. He has revised its tense since. He lives in Hull House, Chicago, and is writing his autobiography under the working title of An Old Man of Thirty.

When I was in college, ten years ago, the bright young men were taking the Oxford oath. I was one of the bright young men, but I didn't take the Oxford oath. Of course I wasn't going to fight in any more imperialist wars, but something told me that the rest of the boys were. Something told me that these peacetime pacifists were bad company. Something told me that they wouldn't fight in any more imperialist wars except the next one. So I didn't take the Oxford oath.

Sure enough, I'm all alone now, as I was then. Of a dozen college friends, all of them the noisiest kind of slackers back in 1929, only one of them isn't itching to get his hands on a gun. He says he's going underground when we enter the war, and he's going to work for the revolution, and he wants

Exhibit "A"—(Continued)

to know if I'm with him. No, I'm against him, and it isn't because I've fallen for the democracy bunk again. It's because I haven't fallen for the democracy bunk or the revolution bunk either. I'm going to sit this one out for reasons all my own.

I think I know what brought the rest of the peacetime pacifists around, and I'm not sure that another batch of Hun atrocities—beg pardon, Nazi atrocities—won't bring me around. I'm afraid that when the bands start playing I'll get in line. I'm afraid that when the heat is on * * * sing psalms or empty bedpans behind the lines. I do not face this problem by getting a bombproof job in Washington while the goofs go out and stop the bullets. There is only one way to face this problem, and that is to face it. I have to decide, now or when we enter the war, to stand up and fight or to stand up and oppose the war.

And so I exercise such prudence as the unpredictable future permits and I make my decision now. I make my decision to oppose this war, to oppose it now and when America enters it, and I make that decision despite my horror of "the Berchtesgaden maniac" and my disinclination to set myself up as martyr to my ideals. I oppose the current war for three reasons. I think it will destroy democracy. I think it will bring no peace. And I think it will degrade humanity. And after I have explained what I mean, I shall try to answer the arguments of the peacetime pacifists.

Let me imagine that, as an average citizen of

Exhibit "A"—(Continued)

Massachusetts Bay Colony, I went to war, one fine day in 1755, in defense of home and fireside against the French and Indians. I subsequently learn that I fought and bled for the * * * * *

EXHIBIT "B"

Conscience and the Commonwealth

By Milton Mayer

I am a conscientious objector to this war, but I am not a pacifist; I am not a conscientious objector to war. I should like to explain my position to my countrymen. I do not hope to persuade them to it in time of war; but the war will end some day, and I should like to be of use to them then, at the cost, perhaps, of annoying them now.

By "pacifist" I mean the man who asserts that he will never support any war, and that all wars, future as well as past and present, are unjust. Here, it seems to me, the pacifist makes a fundamental error about the nature of man. He denies, in effect, that men are animals, with animal passions which may be more or less perfectly controlled but never perfectly. He mistakes men for angels. At the opposite extreme from the pacifist is the fascist, who mistakes men for beasts. The pacifist says that men, because of their nature, must never fight; the fascist says that men, because of their nature, must never do anything else.

The fact of the matter was discovered some two thousand years ago by a great many philosophers and is being rediscovered today by a great many

Exhibit "B"—(Continued)

psychologists. The fact of the matter is that man is an animal modified upward from the beasts and downward from the angels, retaining, as in all mergers, the worst features of each.

All Approve Organized Force

What does the pacifist mean by war? Surely not the passé notion of declared war among nations. I take it he means the use of organized force against men. But all men, including all pacifists, have always used organized force against men. No responsible member of any imperfect community—and all communities have always been imperfect—has ever suggested that law, unsupported by the night-stick, is adequate for the maintenance of justice.

I am sure that all pacifists support compulsory education, compulsory vaccination, and compulsory taxation, even when force is required to effectuate these blessings. Non-violent resistance in India is not right because India's cause is right. It is right because it is effective in the support of India's righteous cause. Gandhi is reported to have said that Satyagraha is the only weapon of an unarmed people. The immobile violence of Satyagraha is still violence; if enough Indians lie down on a railroad track, they will wreck the train and kill the passengers. The pacifist distinction between "force" and "violence" is meaningless.

I am afraid the pacifist is at bottom a sentimentalist, and not a psychologist or philosopher at all. He wishes that men were angels. He sees the horrors of war portrayed by a Tolstoi or a Goya and

Exhibit "B"—(Continued)

he hears their terrible words, "Is this what you were born for?" Horrified, he cries, "No!" and before he knows it he's a pacifist. But sentimentality is known to be the most unreliable of all human commodities, and so, when our peacetime pacifist sees the pictures of Jews or Christians tortured by Hitler, his sentimentalism sweeps him away again, and before he knows it he's a militarist. I can think of no movement in history so regularly and predictably emptied and filled and emptied again as pacifism, and I am afraid the reason is that pacifism is ultimately sentimentalism.

Realism's Requirement

But those of us who fight against this war have got to be realists. We have got to be realists because we want to get something done. And realism, it seems to me, compels us to face the fact that men are born to use all their powers to improve their lot. Nor can they always choose when to use which powers; they cannot think without sometimes feeling or feel without sometimes acting.

In this predicament—the human predicament—the rational use of force will always be necessary in the human community. With the increase of justice the use of force will be increasingly dispensable. But the pacifist seems to suppose that the time will come when force may be dispensed with altogether. He seems to suppose that the rational animal will some day get rid of the animal and consist entirely of the adjective.

I know that the use of force, even the just use

Exhibit "B"—(Continued)

of force, is always degrading to him who uses it. I know as well as W. S. Gilbert that the policeman's lot is not a happy one. But we have got to have policemen, and the highest-minded policeman sometimes has to crack heads in the course of enforcing just laws relating to vaccination, education, the payment of taxes, and the orderly emigration from a burning theater. Against an unjust assault by an unjust community, a just community would be compelled to have an army.

Is Man's Life Sacred?

I cannot follow the pacifist doctrine of the sanctity of human life. Certainly no non-believer in God can see anything sacred about a piece of meat running around on two legs with somebody else's fur on him instead of his own. The believer discerns something divine in every featherless biped, but even that discernment does not entitle him to be a pacifist. For if he holds human life sacred, he must certainly hold his own sacred, not because it is his but because it is a human life. If, then, he is attacked by a man who proposes to kill him, he must use whatever means are necessary, including wounding his assailant, perhaps fatally, to prevent the taking of a human life.

To the pacifist who rests his case on the sanctity of human life, any warring government will always say: "We, too, maintain the sanctity of human life. This is a defensive war, and we do not want to kill anybody. The killing we are compelled to do

Exhibit "B"—(Continued)

is strictly accidental. We have to keep the aggressor from killing us." I do not see how the pacifist can answer that argument unless he asserts that the war in question is not defensive. He will * * * * *

EXHIBIT "C"

Conscience and the Commonwealth. In Two Parts—

Conclusion. By Milton Mayer

We who fight against this war have got to face the fact that we are revolutionaries, rebelling against injustice, all injustice everywhere; rebelling against the injustice which produces the unjust wars which produce still more injustice. Our revolution cannot be bloody, for there is no percentage, as Louis Bonaparte put it, in merely "turning over the dungheap." But even if we thought that we could change men's hearts by blowing their heads off, we would still have to restrain ourselves from bloody revolution. With bombing planes selling at \$250,000 apiece, we modern revolutionaries cannot hope to get anywhere with violence.

But we would be skeptical of violence anyway, because we want our revolution to stick. With Machiavelli, that most practical of men, we see that the only two practical ways to treat people are to liberate them or exterminate them. Anything less than liberation and short of extermination merely irritates them.

'Not Enough Nails'

Among more or less equally guilty members of the human species, these repeated attempts to ex-

Exhibit "C"—(Continued)

terminate do not work. "There are not nails enough," as Carl Sandburg says, "to nail down victory." Even if we took Machiavelli's advice and exterminated our enemies—a sizable sewerage job, if nothing else—we might still fall victim, when we got soft and careless, to their children, to their neighbors who feared that they might be next on our list, or to our own dreadful sense of guilt.

And so our revolution cannot be bloody. And yet it must be the most radical revolution ever made. Any fairly mature infant must be at least dimly aware of the fact that something is radically wrong with the world. Radical revolution is the only hope of a world that has something radically wrong with it. And I call not only idealists to this revolution, but all men, including the most selfish, who disclaim any interest in the salvation of civilization and insist that they are interested only in protecting, defending and improving the comfort of themselves and their families. They cannot get comfort for themselves and their families in a world like this.

The radical revolution to which we all are called is a revolution of the political, economic and social values that flourish all around us and will flourish even more gaudily as the result of an unjust war.

A Revolutionary Slogan

For our political revolution we must take over the revolutionary slogan that all men are created equal and endowed by their Creator with certain inalienable rights. And by "all men" I mean noth-

Exhibit "C"—(Continued)

ing less than all men, including Jews in Germany, Negroes in Charleston, Germans who are now nazis, Japs who are now atrocious, and General Blood and Guts Patton. There must be no political slavery for any man anywhere—and, lest you think that this part of our revolution is the easy part, let me remind you that three-quarters of all the people on the earth are colonial or semi-colonial slaves.

The economic revolution we must make is even more heroic in size than the political revolution. We must overturn the economic order which makes political slavery inevitable.

It is no accident that most wars are between the so-called "have" and "have-not" nations, and this war the most sharply so of all that we have known. The economic order which we must overturn is the one that enables Mr. Churchill to hold what he has, whether or not he stole it. If Germany really needs some of what Mr. Churchill has, Germany must not be allowed to take it; it must be taken from Mr. Churchill and handed to Germany on a silver platter. In such an economic order, and only in such an economic order, will there be no Hitlers arising on the doctrine that people can get what they need only by hijacking it from the thieves who stole it from somebody else.

We must overturn an economic order that necessitates injustice. The order I refer to is capitalism, which is now engaged in an expensive attempt to change its name to free enterprise. I am not talking about limited private * * * * *

EXHIBIT "D"

Sit This One Out?

All the king's horses and all the king's men could not divert the world from the course which has brought it to its present pass; what, then, can I do, one man?

Milton Mayer

Just before the Second World War began, I decided to sit it out and said so. ["I Think I'll Sit This One Out!" Saturday Evening Post, Oct. 7, 1939.] I was younger then. Now I am older, and they tell me that blood is the milk of old men.

My position fourteen years ago was not religious. I decided against war on rational grounds and proclaimed myself a moral and social revolutionary. War, I thought, required men to violate their moral and social nature and employed, in its own nature, disproportionate means to the ends it pursued. I was sure—so young was I—that the Second World War would fail, like the First, to save the world for democracy.

Although I believed at the time that man's nature is God-given, I did not advance that most certain of arguments but rested my case, rather, on the evidence of things seen. I was not persuasive; the war went forward, ending, at last, in an unconditional victory over the forces of darkness.

I was then, as I am now, a Jew. I was, as I am now, a fellow-traveler of many Christian agencies, but it never occurred to me that I should become a Christian, or even, in a sense, that I should want

Exhibit "D"—(Continued)

to. I knew I was not good enough to be a Christian or a Jew. But Judaism was stuck with me. And the fact that I was not a good Jew did not entitle me to be a bad Christian. In addition, but by no means incidentally, my faith seemed to me to require that a Jew be a Jew not only in God's eyes and his own, but also in the world's; a point which has to be (and has been) argued elsewhere.

I have not made much progress in these past fourteen years. My prospect of rejection by the armed forces has improved, but I cannot say the same of my prospect of acceptance in higher circles, such as the Empyrean. I have, however, met some interesting people. In a period of national ecstasy my melancholy views had relieved me of some of my business connections, and I found that time was cheaper to come by than business—and very little less profitable, what with taxes and all. I took time to acquaint myself with Holy Writ and with holy men and was drawn, through God's grace, mistaken identity, or false pretenses, into progressively deeper association with religious activities, Jewish, Catholic, and Protestant.

I discovered that the Jewish Law permits a man to be peaceable and, indeed, unless God's call to the contrary is clear, requires him to be. I discovered that, for those Jews who read the Law equivocally, Christianity, which came to fulfill the Law, was clear and rigid on the point. "Ye have heard that it hath been said . . . But I say unto. . ."

Exhibit "D"—(Continued)

I discovered that Jesus took the peaceable way, offered it to a young man of flesh and blood, and taught it not only to disciples but to the multitude; that the peaceable Wayfarer was given His armament to carry not by His friends, but by His enemies, and at the end of the way was nailed to it; that the sword and the knout which were spoken of were not the sword of Acheson and Dulles and the knout of Hitler, Stalin, and McCarthy; and that when President Eisenhower, defending his rejection of clemency for the Rosenbergs, said, "Render unto Caesar the things that are Caesar's," he was quoting a reply to a question asked in wickedness.

If I am wrong about all these things, I am mortally wrong. I know that many who come in Christ's name, with better preparation than mine, are against me. Still, in these fourteen years, I have found support in a very small minority of every communion which professes Christ. And when the World Council of Churches announced, in 1948, that "war is contrary to the will of God," I rejoiced that my view of God's will had found its way into the church councils of this world. But when, in its next breath, the World Council said that there were three Christian attitudes toward war, I thought of the words of the Lord to my ancestor Isaiah, "Thou art wearied in the multitude of thy counsels," and of the words of the Lord to my ancestor Zephaniah, "I said, 'Surely thou wilt fear me, thou wilt receive instruction,' but they rose early, and corrupted all their doings." I did not dare to think of what Jesus

Exhibit "D"—(Continued)

said of those whom he found in Moses' seat: "Do not ye after their works, for they say, and do not."

Mr. Mayer recently served as visiting faculty member of the Institute for Social Research of Frankfurt University. He is now finishing a book on Germany.

October 23, 1953.

EXHIBIT "E"

U. S. Treasury Department
Internal Revenue Service

Oct. 21, 1953

Milton S. Mayer
5837 Blackstone Ave.
Chicago 37, Ill.

Account Number
53 22 3901108

Tax Period	Date		
Yr. Mo.	Mo. Day Yr.	Tax	Credits
52 / 00	03 / 15 / 53	198.76	\$99.38 cr
	3 / 16 / 53	Trfd Fr Uncl Cfy 44	66.60 cr
1st Notice	3 / 30 / 53	Unpaid Balance	\$32.78
2nd Notice	7 / 22 / 53	Penalty of 5 Percent.....	
Inc.	Interest, From 3/15/53 to 10/15/53.....		1.16
Type of Tax		Total	\$33.94

Pursuant to the provisions of law which the Collector of Internal Revenue is required to enforce, a warrant for distraint has been issued which authorizes the seizure and sale of your property or rights to property, or levy upon your salary, wages or other income. The warrant, now being held in this office, commands the taking of such distraint action, if necessary, as a means of collecting the account shown above.

To avoid the inconvenience, embarrassment and additional costs that result from such procedure, immediate payment should be made at the address shown below.

If remittance is made by mail, your check or money order should be made payable to the Collector of Internal Revenue. This letter should be returned with your remittance to:

Collector of Internal Revenue, South Division Office, 6555 Cottage Grove Avenue, Chicago 37, Illinois.

EXHIBIT "F"

U. S. Treasury Department
Internal Revenue Service

Milton S. Mayer
P. O. Box 2671
Carmel, Calif.

54 Apr 590197
Tr Fr Chicago, Ill.
23C 2 24 53
DAR 2 27 53

Date	Debits	Credits	52 IT Unpaid Balance
3 15 53	198.76	99.38	
3 61 53		66.60	32.78
Date of First Notice	Penalty of 5 percent		-----
3 30 53	Interest from		
	3 30 53 to 5 30 54		2.50
Date of Second Notice	Total		-----
7 22 53	Additional Interest GB		-----
	Total		35.28

Account Number and Remarks

Pursuant to the provisions of law which the Director of Internal Revenue is required to enforce, a warrant for distraint has been issued which authorizes the seizure and sale of your property or rights to property, or levy upon your salary, wages or other income. The warrant, now being held in this office, commands the taking of such distraint action, if necessary, as a means of collecting the account shown above.

To avoid the inconvenience, embarrassment and additional costs that result from such procedure, immediate payment should be made at the address shown below.

If remittance is made by mail, your check or money order should be made payable to the Director of Internal Revenue. This letter should be returned with your remittance to:

Director of Internal Revenue, 221 Salinas Street, Salinas, California.

EXHIBIT "G"

Director of Internal Revenue May 29, 1954
221 Salinas Street, Salinas, California.

In re your: 54 Apr 590197. Tr fr Chicago, Ill.
23C 2 24 53. DAR 2 27 53.

Dear Sir:

I am in receipt of your notice of issuance of a warrant of distraint in the above matter.

As you may have been informed by the Director in Chicago, who kindly acceded to my request that the matter be transferred to your office, the matter is one of principle as far as I am concerned. It is for this reason that I am writing to ask if execution of the warrant can be postponed until I have presented a brief to the Commissioner of Internal Revenue in support of my position. Because of the pressure of work I shall not be able to deliver such brief to the Commissioner before August 15, 1954. I shall at the same time deliver a copy of such brief to you.

During the interval between now and August 15, 1954, I shall be continuously within the physical jurisdiction of the Internal Revenue Service and (unless I travel abroad thereafter as a U. S. citizen, in which case I shall keep you continuously informed of my location) I can be reached immediately at all times at the above address in Carmel, California, where my residence telephone number is Carmel 7-3422.

I shall appreciate your acceding to my request and to your notifying me to that effect.

Sincerely yours,

EXHIBIT "H"

Milton Mayer, P. O. Box 2671, Carmel, California

August 15, 1954.

Commissioner T. Coleman Andrews

Internal Revenue Service

U. S. Treasury Department

Washington, D. C.

In re your 54 Apr 590197. Tr fr Chicago, Ill.
23C 2 24 53. DAR 2 27 53.

From Director of Internal Revenue, Salinas,
Calif.

Dear Mr. Commissioner:

In the above matter a warrant of distraint has been issued for collection from me of \$32.78 plus \$2.50 interest, which the Internal Revenue Service claims as the unpaid balance of my 1952 income tax.

My 1952 return was filed with the Director of Internal Revenue at Chicago, Ill., my place of permanent residence, as have my returns for succeeding years. I can now be reached either through my permanent residence, 5837 Blackstone Avenue, Chicago 37, Ill., or at the above address in Carmel, Calif. The instant matter was transferred at my request by the Director of Internal Revenue at Chicago to the Director of Internal Revenue at Salinas, Calif., inasmuch as I expect to be in Carmel for several months.

On May 29, 1954, immediately upon receipt of the notice of issuance of the warrant, I wrote the Director at Salinas asking if service of the warrant might be delayed until I was able to take up the

Exhibit "H"—(Continued)

matter with you. I told him that I should have to be traveling until August 15, 1954, and that I should then submit a brief to you and send him a copy of it.

In the absence of my counsel, Mr. Francis Heisler of Chicago and Carmel, and of the Illinois and California bars, I am undertaking to submit the brief in the form of this letter.

I am a conscientious objector to participation in war, and have been publicly identified as such since 1939. I have come to the conclusion that I can not, in conscience, and in love of my country, encourage my country's government to spend my country's substance in the killing of my innocent fellowmen anywhere, or in preparation for killing them, or in preparing my fellow-Americans of military age to kill and be killed.

I have stated and argued my position publicly on many occasions, and on many occasions published it. One of the recent occasions was in *The Commonwealth*, and American religious (Roman Catholic) weekly periodical, in its issue of October 23, 1953, under the title "Sit This One Out?" I attach a copy of the published article as a part of this brief.

The \$32.78 plus \$2.50 interest claimed by the Internal Revenue Service in the present matter represents 50% of the balance due, as of March 15, 1953, of my 1952 income tax. I withheld 50% of the amount claimed on the basis that at least 50% of my income tax is used for purposes of war, which I can not in conscience support. (The percentage so used

Exhibit "H"—(Continued)

is, while difficult to determine exactly, actually much larger than 50%.)

For several years past I have taken this position with reference to my income tax, but 1952 was the first of those years in which I was owing a tax at the end of the year. I have repeatedly informed both the Director of Internal Revenue at Chicago and the President of the United States of my position, and I have repeatedly stated, and I do so here, that I do not challenge the right of my government to tax me, in any amount whatever, for purposes which I can support in conscience. I support the principle of progressive income taxation, and I do not object to the present rate. What I object to is my country's use of my money for war and for the delusion that war can be prevented by armaments.

I appeal to you, sir, as I have on previous occasions to the Director of Internal Revenue at Chicago and to the President of the United States, to make it possible for me to pay the full amount of my income tax in conscience. I wish to pay the amount claimed, and any and all other amounts my government may claim, for any and all purposes which I can recognize, in simple conscience, as consistent with or conducive to the general welfare. If the amount claimed here can be so paid in, and so used, I shall pay it not only voluntarily, but gladly.

Until this protest of mine can be resolved, either by my government's allowing me to pay the full

Exhibit "H"—(Continued)

amount of my taxes for purposes of the general welfare, or by legal proceedings in which I may challenge my government's right to tax me against my conscientious and religious precepts, I urge you to withhold execution of the warrant for distraint which has now been issued.

I shall be grateful to you for your earnest consideration of my appeal, and for any effort you may be able to make to free me from my dilemma.

Sincerely yours,

Milton S. Mayer.

cc: Director of Internal Revenue, 221 Salinas Street, Salinas, Calif. Mr. Francis Heisler, Attorney-at-Law, Carmel, Calif.

EXHIBIT "I"

U. S. Treasury Department November 3, 1954
Internal Revenue Service
575 Calle Principal
Monterey, California

Attention: Miss Fassinger.

Dear Miss Fassinger:

I am sorry that I can not now bring myself, voluntarily and in conscience, to support war or an armaments race which, if it follows the course of every armaments race in human history, will end in war. The only direct contribution to this end which my Government requires of me is a large proportion of my United States income tax. I must therefore reaffirm my position, which I have af-

Exhibit "I"—Continued)

firmed to the Commissioner of Internal Revenue and to you, with reference to that proportion of my 1952 income tax which I calculate is used by my Government to this end.

I may add that I am and always have been and will be, I hope, a loyal and patriotic citizen of that nation whose motto is, "In God We Trust." If the World Council of Churches is correct in asserting that "war is contrary to the will of God," I feel that a citizen of the United States well serves his country by trying to follow the will of God.

I want to say that I do not dispute the amount or computation of the tax, and that I believe in progressive income taxation of whatever degree necessary for the good of my country and its citizens. I want also to thank you and the other representatives of the Internal Revenue Service with whom I have dealt for your uniform friendliness and your concern to help me in my dilemma.

My hope remains that my Government can and will find a way in which I may be allowed in conscience to pay whatever taxes it claims. Our statesmen and our people all profess their attachment to peace, and I am sure that they do so sincerely. Sharing their view, I know of no way to support it better than to pay my taxes for peaceful purposes.

Sincerely yours,

Milton S. Mayer.

EXHIBIT "J"

36.55	54-Apr-590197	36.55
District Director of Internal Revenue		36.55

Thirty-Six and 55/100_____

Collection Officer's Receipt for Taxes (Original)

No. 3539738. Check: (2-28) \$36.55. Date (Month, day, year): 1-9-55. Received of (Name): Milton S. Mayer. Address (Number, street, city, zone, State): P. O. Box 2671, Carmel, Calif. Sum of: \$36.55. Tax: \$32.78. Interest: \$3.77. Covering (Class of tax): IT. Due for the (Period covered): 1952. The remittance will be forwarded to the District Director of Internal Revenue District at San Francisco, California. Signature of Collection Officer: Wanda T. (illegible).

[Endorsed]: Filed December 17, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF PLAINTIFF'S ATTORNEY

State of California,
County of Monterey—ss.

Francis Heisler, being first duly sworn, deposes and says:

That he is a practicing attorney admitted to practice in the State of California, and admitted to practice before this Honorable Court, as well as before the Supreme Court of the United States.

That he is one of the attorneys for plaintiff Milton Mayer in the above entitled cause, and he prepared together with his associates the complaint

filed by said plaintiff in this action. He says that upon careful investigation, the facts set forth in the complaint appear to him to be true. He further investigated the pertinent laws, and he believes that under the laws of the United States and the Constitution thereof, the prayer of the plaintiff for the relief asked for is fully justified in law.

Affiant further says that the prayer of the plaintiff for a restraining order against defendants is fully justified in law on the basis of the facts alleged in the complaint, and that such order for a restraining order ought to issue. Such order in the instant case is proper and necessary because he truly believes that without it the plaintiff will be irreparably damaged. Without such order, plaintiff will be penalized either by a threatened levy upon his property or by a subsequent disability to claim his status as a conscientious objector.

Affiant submits this affidavit for the purpose of presenting to this Court that his belief that a restraining order without notice upon defendants ought to be granted to plaintiff as prayed for in his complaint.

/s/ FRANCIS HEISLER,

One of Attorneys for Plaintiff.

Subscribed and sworn to before me this 14th day of December, 1956.

[Seal] /s/ FRANCES A. OLIVER,

Notary Public in and for the County of Monterey,
State of California. My Commission Expires
October 15, 1957.

[Endorsed]: Filed December 17, 1956.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon reading the verified complaint for injunction and declaratory relief of plaintiff here, wherefrom it appears that unless defendants above named, their officers, agents, servants, employees and all others acting under their control and direction and by virtue of their orders, are restrained from doing and threatening to do the acts of which complaint is herein made, that plaintiff will suffer great and irreparable damage; and it further appearing that it is accordingly appropriate to issue a restraining order against defendants, without notice, and that the issuance of such restraining order will not prejudice the interest of defendants or of the United States, now, therefore:

It Is Further Ordered that defendants above named be and appear before the above entitled Court, the Honorable O. D. Hamlin, Judge thereof, at his courtroom, Post Office Building, Seventh and Mission Streets, San Francisco, California, on the 27th day of December, 1956, at the hour of 10 o'clock a.m. of said day, then and there to show cause, if any they may have, why a preliminary injunction should not issue out of this Court enjoining and restraining defendants, their officers, agents, servants, employees, and all others acting under the control and direction and by virtue of their orders, from doing any and all of the acts for which an injunction is prayed in said complaint for

injunction and declaratory relief and contained in the within restraining order.

It Is Further Ordered that this order to show cause and restraining order, together with the verified complaint and memorandum of points and authorities, may be served by attorneys for plaintiff.

Done in Open Court this 17th day of December, 1956.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed December 17, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To Heisler and Stewart, P. O. Box 3996, Carmel, California:

Please Take Notice That on Monday, March 4, 1957, at the hour of 9:30 a.m., in the court room of the Master Calendar Judge, United States Court-house and Post Office Building, San Francisco, California, the defendant Harold Hawkins will move the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action on the ground that the court lacks jurisdiction because the action is for a declaratory judgment with respect to Internal Revenue taxes.

3. To dismiss the action on the ground that the

court lacks jurisdiction because the action is for an injunction restraining the collection of federal income taxes.

4. To dismiss the action on the ground that the plaintiff has failed to join indispensable parties.

Dated: February 15, 1957.

LLOYD H. BURKE,

United States Attorney,

/s/ By MARVIN D. MORGANSTEIN,

Assistant United States Attorney.

Certificate of Service Attached.

[Endorsed]: Filed February 15, 1957.

In the United States District Court, Northern
District of California, Southern Division

No. 36066

MILTON MAYER,

Plaintiff,

vs.

ERNEST WRIGHT, et al.,

Defendants.

ORDER DISMISSING CAUSE

Defendants' motion to dismiss the cause is granted.

Wherefore, It Is Ordered, Adjudged and Decreed that the above entitled cause be and the same is hereby dismissed.

Dated: March 18, 1957.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed March 18, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Order Appealed From: Order of March 18, 1957 entered by the Honorable Louis E. Goodman, one of the Judges of the United States District Court for the Northern District of California, Southern Division, dismissing the above entitled cause.

The above named plaintiff-appellant hereby appeals to the United States Court of Appeals of the Ninth Circuit from the above stated Order of March 18, 1957.

May 13th, 1957.

HEISLER & STEWART,
/s/ By FRANCIS HEISLER,
/s/ CHARLES A. STEWART,
Attorneys for Plaintiff-Appellant.

[Endorsed]: Filed May 13, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

The premium on this bond is \$10.00 per annum.

Whereas, the Plaintiff has appealed to the United States Circuit Court of Appeals, for the Ninth Circuit from the judgment of this court entered

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, Maryland Casualty Company, a corporation duly organized and existing under the laws of the State of Mary-

land, and duly authorized to transact a general surety business in the State of California, does undertake and promises on the part of the Plaintiff, to secure the payment of costs if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

It is expressly agreed by the Surety that in case of a breach of any condition hereof, the above entitled Court, may proceed summarily in the above entitled action in which this bond is given, to ascertain the amount which the Surety is bound to pay on account of such breach and render judgment therefor against the Surety and award execution therefor, all as provided by and in accordance with the intent and meaning of Section 73C of the Federal Rules of Civil Procedure.

In Witness Whereof, the corporate seal and name of the said Surety Company, is hereto affixed and attested at San Francisco, California, by its duly authorized officer, this 13th day of May, 1957.

[Seal] MARYLAND CASUALTY
COMPANY,

/s/ By C. BAIRD,
Attorney-in-Fact.

Notary's Certification Attached.

[Endorsed]: Filed May 13, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Complaint.

Affidavit of Francis Heisler.

Order to Show Cause.

Minute Order denying motion for preliminary injunction and for discharge of order to show cause.

Notice by Defendants to Dismiss.

Order Dismissing Cause.

Notice of Appeal.

Appeal Bond.

Appellant's Designation of Record on Appeal.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of June, 1957.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy.

[Endorsed]: No. 15594. United States Court of Appeals for the Ninth Circuit. Milton Mayer, Appellant, vs. Ernest Wright, Regional Commissioner of Internal Revenue Service and Harold Hawkins, District Director of Internal Revenue Service, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: June 21, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15594

MILTON MAYER,

Appellant,

vs.

ERNEST WRIGHT, REGIONAL COMMIS-
SIONER OF INTERNAL REVENUE
SERVICE and HAROLD HAWKINS, DIS-
TRICT DIRECTOR, INTERNAL REVE-
NUE SERVICE, Appellees.

STATEMENT OF POINTS RELIED UPON
BY APPELLANT

The points upon which appellant will rely on appeal are:

The Trial Court erred:

1. In dismissing the complaint on the ground that it failed to state a claim against appellees upon which relief can be granted.
2. In dismissing the complaint for lack of jurisdiction in an action for a declaratory judgment with respect to Internal Revenue taxes.
3. In dismissing the complaint on the ground that the court lacks jurisdiction because the action is for an injunction restraining the collection of federal income taxes.

4. In dismissing the complaint on the ground that the plaintiff failed to join indispensable parties.

HEISLER & STEWART,

/s/ By FRANCIS HEISLER,

/s/ CHARLES A. STEWART,

Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 19, 1957. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To Clerk of the United States Court of Appeals for
the Ninth Circuit:

Appellant hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit taken by notice of appeal the following portions of the record, proceedings, and evidence in this action:

1. Complaint for Declaratory Judgment and for Injunction.
2. Affidavit of Plaintiff's Attorney.
3. Order to Show Cause.
4. Notice of Motion to Dismiss.
5. Order Dismissing Cause.

6. Notice of Appeal.
7. Copy of Cost Bond.
8. This Designation of Contents of Record on Appeal together with Proof of Service.
9. Certificate of the Clerk.

HEISLER & STEWART,
/s/ By FRANCIS HEISLER,
/s/ CHARLES A. STEWART,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 19, 1957. Paul P. O'Brien,
Clerk.

**in the United States Court of Appeals
for the Ninth Circuit**

MILTON MAYER, APPELLANT

v.

**JOHN WRIGHT, REGIONAL COMMISSIONER OF INTER-
NAL REVENUE SERVICE AND HAROLD HAWKINS,
SAC, DISTRICT DIRECTOR OF INTERNAL REVENUE SERV-
ICE, APPELLEES**

**Appeal from the Order of the United States District
Court for the Northern District of California**

BRIEF FOR THE APPELLEES

CHARLES K. RICE,
Assistant Attorney General.

**LEE A. JACKSON,
L. HENRY KUTZ,
KARL SCHMEIDLER,**
*Attorneys,
Department of Justice,
Washington 25, D. C.*

JOHN H. BURKE,
United States Attorney.

DAVID D. MORGENSTEIN,
Assistant United States Attorney.

FILED

OCT 23 1957

PAUL P. O'BRIEN, Clerk

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitution and statutes involved.....	3
Statement	5
Summary of argument.....	6
Argument:	
The District Court correctly dismissed taxpayers cause of action	10
A. The District Court was without jurisdic- tion to grant the declaratory judgment sought	10
B. The District Court was without jurisdic- tion to enjoin the collection of federal taxes	12
C. The complaint failed to state a cause of ac- tion for refund of taxes.....	16
D. The complaint failed to state a claim upon which relief can be granted since its al- legations fail to set forth a justiciable controversy, and the District Court lacked jurisdiction	18
E. In imposing the income tax and providing for its collection Congress made no law respecting establishment of religion nor prohibiting the free exercise thereof in violation of the First Amendment to the Constitution	25
Conclusion	30

CITATIONS

Cases:

<i>Allen v. Regents</i> , 304 U.S. 439.....	13
<i>Angelus Milling Co. v. Commissioner</i> , 325 U.S. 293	17
<i>Associated Press v. Labor Board</i> , 301 U.S. 103.....	27
<i>Associated Press v. United States</i> , 326 U.S. 1.....	27
<i>Bailey v. George</i> , 259 U.S. 16.....	14
<i>Brushaber v. Union Pac. R.R.</i> , 240 U.S. 1.....	26
<i>Butler v. Kavanagh</i> , 64 F. Supp. 741, affirmed <i>per curiam</i> , 156 F. 2d 158.....	27

<i>California v. Latimer</i> , 305 U.S. 255.....	13
<i>Cheatham v. United States</i> , 92 U.S. 85.....	17
<i>Communist Party, U.S.A. v. Moysey</i> , 141 F. Supp. 332	14
<i>Davis v. United States</i> , 235 F. 2d 174.....	18
<i>Dodge v. Osborne</i> , 240 U.S. 118.....	14
<i>Ertle v. United States</i> , 93 F. Supp. 619.....	18
<i>Farmer v. Roundtree</i> , 149 F. Supp. 327.....	23
<i>Follett v. McCormick</i> , 321 U.S. 573.....	26
<i>Gange Lumber Co. v. Rowley</i> , 326 U.S. 295.....	23
<i>George v. United States</i> , 196 F. 2d 445, certiorari denied, 344 U.S. 843.....	28
<i>Graham v. DuPont</i> , 262 U.S. 234.....	13
<i>Grosjean v. American Press Co.</i> , 297 U.S. 233.....	26
<i>Hamilton v. Regents</i> , 293 U.S. 245.....	28
<i>Hirabayashi v. United States</i> , 320 U.S. 81.....	16
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11.....	27
<i>Jewel Shop of Abbeville, South Carolina v. Pitts</i> , 218 F. 2d 692.....	14
<i>Kitagawa v. Shipman</i> , 54 F. 2d 313.....	26
<i>Labor Board v. Virginia Power Co.</i> , 314 U.S. 469	27
<i>Lockerty v. Phillips</i> , 319 U.S. 182.....	18
<i>Lorain Journal v. United States</i> , 342 U.S. 143.....	27
<i>Magnano Co. v. Hamilton</i> , 292 U.S. 40.....	26
<i>Manne v. Commissioner</i> , 155 F. 2d 304.....	23
<i>Martin v. Andrews</i> , 238 F. 2d 552.....	11, 13
<i>Massachusetts v. Mellon</i> , 262 U.S. 447.....	19
<i>Matcovich v. Nickell</i> , 134 F. 2d 837.....	14
<i>McCray v. United States</i> , 195 U.S. 27.....	26
<i>Miller v. Nut Margarine Co.</i> , 284 U.S. 498.....	13
<i>Milliken v. Gill</i> , 211 F. 2d 869.....	14
<i>Mitsukiyo Yoshimura v. Alsup</i> , 167 F. 2d 104.....	14
<i>Monge v. Smyth</i> , 229 F. 2d 361, certiorari denied, 351 U.S. 976.....	13
<i>Mormon Church v. United States</i> , 136 U.S. 1.....	27
<i>Murdock v. Pennsylvania</i> , 319 U.S. 105.....	26
<i>Noland v. Westover</i> , 172 F. 2d 614, certiorari denied, 337 U.S. 938.....	12
<i>Okla. Press Pub. Co. v. Walling</i> , 327 U.S. 186.....	27
<i>Payne v. Koehler</i> , 225 F. 2d 103, certiorari de- nied, 350 U.S. 904, rehearing denied, 350 U.S. 955	14

III

Cases—Continued

Page

<i>Phelan v. Taitano</i> , 233 F. 2d 117.....	13, 18
<i>Publishers New Press v. Moysey</i> , 141 F. Supp. 340	14
<i>Reams v. Vrooman-Fehn Printing Co.</i> , 140 F. 2d 237	14
<i>Richter v. United States</i> , 181 F. 2d 591, certiorari denied, 340 U.S. 892.....	28
<i>Rock Island &c. R.R. v. United States</i> , 254 U.S. 141	17
<i>Royce v. Squire</i> , 168 F. 2d 250.....	12
<i>Schenley Distillers v. Bingler</i> , 145 F. Supp. 517....	14
<i>Shapiro v. Lyle</i> , 30 F. 2d 971.....	27
<i>Steward Machine Co. v. Davis</i> , 201 U.S. 548.....	26
<i>United States v. Felt & Tarrant Co.</i> , 283 U.S. 269	18
<i>United States v. Knowles</i> , 235 F. 2d 176.....	18
<i>United States v. Michel</i> , 282 U.S. 656.....	17
<i>United States v. Niles</i> , 122 F. Supp. 382, affirmed <i>per curiam</i> , 220 F. 2d 278.....	16
<i>United States v. Standard Oil Co.</i> , 158 F. 2d 126	18
<i>Voss v. Hinds</i> , 208 F. 2d 912.....	14
<i>Watchtower Bible & Tract Soc. v. Los Angeles County</i> , 181 F. 2d 739, certiorari denied, 340 U.S. 820	27
<i>Whetstone v. United States</i> , 82 F. Supp. 478, af- firmed, April 28, 1949, certiorari denied, 337 U.S. 941, rehearing denied, 338 U.S. 840.....	12
<i>Wilson v. Wilson</i> , 141 F. 2d 599.....	12

Statutes:

Page

Federal Declaratory Judgment Act (Sec. 274D of the Judicial Code).....	10
Internal Revenue Code of 1939, Sec. 3653 (26 U.S.C. 1952 ed., Sec. 3653).....	13
Internal Revenue Code of 1954:	
Sec. 6212 (26 U.S.C. 1952 ed., Supp. II, Sec. 6212)	13
Sec. 6213 (26 U.S.C. 1952 ed., Supp. II, Sec. 6213)	13
Sec. 6511 (26 U.S.C. 1952 ed., Supp. II, Sec. 6511)	17
Sec. 7421 (26 U.S.C. 1952 ed., Supp. II, Sec. 7421)	4, 12

IV

Statutes—Continued:

	Page
Sec. 7422 (26 U.S.C. 1952 ed., Supp. II, Sec. 7422)	4, 17
Sec. 7808 (26 U.S.C. 1952 ed., Supp. II, Sec. 7808)	19
Sec. 7809 (26 U.S.C. 1952 ed., Supp. II, Sec. 7809)	19
Revenue Act of 1935, c. 829, 49 Stat. 1014, Sec. 405	10
Universal Military Training and Service Act, c. 625, 62 Stat. 604, Sec. 6(j) (50 U.S.C. App. 1952 ed., Sec. 456)	28
28 U.S.C., Sec. 2201	3

Miscellaneous:

Borchard, Declaratory Judgments 850 (2d ed., 1941)	11
Constitution of the United States:	
Art. I, Sec. 8	26
Art. III:	
Sec. 1	18
Sec. 2	18
First Amendment	3
S. Rep. No. 1240, 74th Cong., 1st Sess. (1935), p. 11 (1939-1 Cum. Bull. (Part 2) 651, 657)....	11
Wideman, Application of the Declaratory Judgment Act to Tax Suits, 13 The Tax Magazine 539, 540 (1935)	10

**In the United States Court of Appeals
for the Ninth Circuit**

No. 15,594

MILTON MAYER, APPELLANT

v.

ERNEST WRIGHT, REGIONAL COMMISSIONER OF INTERNAL REVENUE SERVICE AND HAROLD HAWKINS, DISTRICT DIRECTOR OF INTERNAL REVENUE SERVICE, APPELLEES

On Appeal from the Order of the United States District Court for the Northern District of California

BRIEF FOR THE APPELLEES

OPINION BELOW

The District Court rendered no opinion in granting the order and judgment dismissing this case. (R. 47.)

JURISDICTION

This case originated as an action for a declaratory judgment, and an injunction to restrain the collection of federal income taxes for the years subsequent to 1952, and for a refund of 1952 taxes and interest. Payment of \$99.38 was credited to taxpayer's ac-

count on March 15, 1953, a credit of \$66.60 on 1952 taxes previously withheld was given to taxpayer on March 16, 1953, and the payment of \$36.55 in taxes and interest was credited to taxpayer's account in April, 1954. (R. 35, 36, 43.) On December 6, 1956, taxpayer filed a complaint for a declaratory judgment, for an injunction to enjoin the collection of taxes and for a refund of taxes in the District Court. (R. 3-43.) Jurisdiction of the District Court was alleged under 28 U.S.C., "Sections 1431, *et seq*" (R. 3-4) [probably Section 1331 was intended]. Before answering, a motion to dismiss the action was filed with the District Court. (R. 46-47.) The order and judgment of the District Court dismissing the cause of action was entered on March 18, 1957. (R. 47.) On May 13, 1957, taxpayer filed his notice of appeal. (R. 48.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

Taxpayer, a conscientious objector, filed his 1952 income tax return and reported his income, but paid only part of the 1952 tax due on the ground that he, as a conscientious objector, cannot pay that part of his tax which is budgeted and expended by the Federal Government for war or for military preparation. Taxpayer filed a complaint which asked for a declaratory judgment as to his obligations for the payment of federal income taxes, which sought an injunction against the collection of that part of his income taxes for years subsequent to 1952, and which are budgeted for war purposes, and which sought a refund of half of his 1952 taxes.

The questions presented are: (1) whether taxpayer may obtain a declaratory judgment under 28 U.S.C., Section 2201, as to his obligation to pay federal taxes; (2) whether the terms of Section 7421(a) of the Internal Revenue Code of 1954 prohibit taxpayer from obtaining injunctive relief against the assessment and collection of his income taxes; (3) whether taxpayer may sue for a refund of taxes paid by him under Section 7422(a) of the Internal Revenue Code of 1954, where he failed to file prior to commencement of his suit a timely claim for refund; (4) whether taxpayer has shown that he has sustained or is immediately in danger of sustaining some direct injury as the result of the enforcement of the tax statutes so as to give to him standing to challenge the use made of his tax; (5) whether the use of tax money for defense purposes results in the unconstitutionality of the taxing statutes as interference with his free exercise of religion under the First Amendment to the Constitution.

CONSTITUTION AND STATUTES INVOLVED

Constitution of the United States:

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Internal Revenue Code of 1954:

* * * *

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN
ASSESSMENT OR COLLECTION.

(a) *Tax*.—Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7421.)

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund*.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

(b) *Protest or Duress*.—Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7422.)

28 U.S.C.:

* * * *

Sec. 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes,

any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

The District Court did not make any findings of fact, and the parties have not filed any stipulation of facts. The case was presented to the District Court on a complaint and attached exhibits, an affidavit to show cause and a notice of motion to dismiss. The pertinent facts as set forth in taxpayer's complaint and supporting papers appear to be as follows (R. 3-43):

Taxpayer alleges that he is a conscientious objector. (R. 4-10, 13-16, 18-20, 23-35, 39-42.) He filed his 1952 income tax return, in which he reported his income and the amount of tax due (\$198.76), but paid only fifty per cent of the tax claimed to be due, i.e., \$99.38, upon the ground that, as a conscientious objector he could not pay that part of his federal taxes which were "budgeted to be expended for war purposes." (R. 8, 9-10.) The Internal Revenue Service also credited taxpayer's account with an additional amount of \$66.60, representing taxes withheld on taxpayer's income, leaving a net unpaid balance for 1952 of \$32.78. (Exs. E, F; R. 35, 36.) Thereafter the Internal Revenue Service advised taxpayer to make payment of the balance due. (R. 10-

11.) On October 21, 1953, and April 5, 1954, warrants for distraint were issued for the unpaid balance plus interest (R. 12-13, Exs. E and F, R. 35-36) and on March 4, 1955, this unpaid balance was collected. (R. 16-17, Ex. J, R. 43).

On December 6, 1956, taxpayer filed a complaint for declaratory judgment and for injunction against the Regional Commissioner and District Director of Internal Revenue, in which he asked for a declaratory judgment as to his rights and obligations to pay "that part of his Federal Income Tax that is expended for past, present, and possible future wars"; for an injunction against "the collection of that part of plaintiff's Federal income tax for the years subsequent to 1952 that is budgeted for war purposes"; and for a refund of \$103.15 in 1952 taxes withheld on his income, including the \$36.55 which he paid after the warrants for distraint had been issued, and, in the alternative, that the District Court should order that fifty per cent of his 1952 and subsequent taxes which were budgeted and expended for war purposes "be placed in the General Funds of the Treasury of the United States to be expended solely for peaceful and constructive purposes." (R. 20-22.) No answer was filed. Upon motion to dismiss made by the District Director of Internal Revenue, the District Court, on March 18, 1957, issued an order dismissing taxpayer's action. (R. 46-47.)

SUMMARY OF ARGUMENT

Taxpayer does not contest his obligation to file income tax returns, to report the proper amount of

tax owed by him, or to pay taxes generally. Instead, the gist of taxpayer's position is that he disapproves of the use to which the Government makes of part of the tax monies it receives from its citizens, and, accordingly, he should not be compelled to pay that proportion of his taxes which is utilized for purposes for which he disapproves. Taxpayer seeks relief from the payment of such part of his taxes for future years, first in the form of a declaratory judgment as to his rights and obligations to make tax payments, and secondly, in the form of an injunction against the collection of such taxes for future years. Additionally, taxpayer is seeking a refund of half of the taxes paid by him for 1952. All of the relief requested is bottomed upon the supposition that the payment of taxes, where part of the budget of the Federal Government is allocated for defense purposes, impinges upon taxpayer's freedom of worship under the First Amendment to the Constitution. It is clear that taxpayer is not entitled to any of the relief sought, and that the District Court properly dismissed his complaint.

1. Section 2201 of 28 U.S.C. specifically provides that the remedy of a declaratory judgment is not available for controversies relating to federal taxes. Since the present case involves the payment of federal income taxes, taxpayer is not entitled to obtain a declaratory judgment as to his rights and obligations for the payment of past, present or future taxes.

2. Section 7421(a) of the Internal Revenue Code of 1954 provides that "no suit for the purpose of restraining the assessment or collection of any tax

shall be maintained in any court.” Although this statutory prohibition has been relaxed in particular cases under extraordinary and entirely exceptional circumstances, as where it is shown that a person would suffer irreparable injury from the failure to restrain the collection of a tax and did not have any adequate remedy at law, taxpayer has failed to show the existence of any such circumstances which would warrant the granting of such an extraordinary remedy to him. To the contrary, it is clear that taxpayer’s allegation, that the collection of the tax is unconstitutional, does not constitute ground for the issuance of an injunction.

3. Section 7422(a) of the Internal Revenue Code of 1954 provides that “No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with the Secretary or his delegate * * *”. Both the 1939 Code and the 1954 Code prescribe for the filing of claims for refund of taxes. The Government can prescribe conditions under which it consents to be sued for the recovery of taxes. These conditions are jurisdictional. They must be complied with strictly and must be established by the person invoking the jurisdiction of a District Court. Since in the present case taxpayer’s complaint fails to show that he has complied with these requirements—by filing a claim for refund, it follows that his complaint failed to state a cause of action, and the District Court properly dismissed his complaint with respect to his claim for a refund.

4. Although the above reasons completely dispose of taxpayer's cause of action, there are additional grounds which support the District Court's order of dismissal. Taxpayer is seeking a determination that the collection of part of his tax is unconstitutional on the ground that it interferes with his freedom to worship under the First Amendment. It is settled, however, that a party, who invokes the power of a court to declare acts of Congress unconstitutional, must be able to show not only that the statute is invalid, but also that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. Taxpayer's sole averment of immediate danger is that payment of half the tax owed by him would deprive him of his status of a conscientious objector since such payment contributes significantly to the war effort. Clearly, the injury complained of by taxpayer is too remote to give rise to a judicial controversy sufficient to afford a basis for invoking the District Court's power, particularly where, as here, taxpayer admits that he is beyond the age which is subject to military service.

5. Congress has broad power to levy and collect taxes. It is settled that the First Amendment is not a limitation upon the tax powers of Congress, and that a conscientious objector may be compelled to pay the taxes owed by him in furtherance of the national defense. Consequently, there is not any support for taxpayer's contention that the requirement that he pay federal taxes on his income impinges upon his

freedom of worship or exercise of religion under the First Amendment.

ARGUMENT

The District Court Correctly Dismissed Taxpayer's Cause of Action

A. *The District Court was without jurisdiction to grant the declaratory judgment sought*

In his complaint, taxpayer asked the court below to grant a declaratory judgment as to his "rights and legal relations" to make "payment of that part of his Federal Income Tax that is expended for past, present, and possible future wars." (R. 20.) The court below was without jurisdiction to grant such a judgment.

Originally, the Federal Declaratory Judgment Act (Sec. 274D of the Judicial Code, as added by the Act of June 14, 1934, c. 512, 48 Stat. 955) conferred jurisdiction upon the federal courts to grant declaratory relief in cases of "actual controversy", but made no reference to cases involving federal taxes. In 1935, however, Congress amended this provision by Section 405 of the Revenue Act of 1935, c. 829, 49 Stat. 1014, expressly to except from its operation controversies "with respect to Federal taxes," and the section, as amended, currently is 28 U.S.C., Section 2201, *supra*. This action, to except cases involving federal taxes, was taken at the initiative of the Department of Justice which urged on the Senate Committee on Finance that applicability of the act to income taxes would be "a complete reversal of our present scheme of taxation" and of the essential principle "that taxpayers be required to 'pay first and litigate later.'" See Wideman, Application of the

Declaratory Judgment Act to Tax Suits, 13 *The Tax Magazine* 539, 540 (1935); Borchard, *Declaratory Judgments* 850 (2d ed., 1941). The Report of Senate Committee on Finance (S. Rep. No. 1240, 74th Cong., 1st Sess. (1935) p. 11 (1939-1 Cum. Bull. (Part 2) 651, 657)) makes it clear that the Federal Declaratory Judgment Act has no application to federal taxes, saying:

Your committee has added an amendment making it clear that the Federal Declaratory Judgments Act of June 14, 1934, has no application to Federal taxes. The application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that the orderly and prompt determination and collection of Federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private controversies, and that existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors.

This statutory prohibition against declaratory judgments in federal tax cases uniformly has been sustained, and contrary to taxpayer's contention (Br. 43-45) the statute does not permit any exception where exceptional circumstances are alleged to be present.¹ See *Martin v. Andrews*, 238 F. 2d 552, 554

¹ In any event, taxpayer has not shown the existence in the present case of any exceptional circumstances.

(C.A. 9th); *Noland v. Westover*, 172 F. 2d 614 (C.A. 9th), certiorari denied, 337 U.S. 938; *Royce v. Squire*, 168 F. 2d 250, 251 (C.A. 9th); *Whetstone v. United States*, 82 F. Supp. 478 (N.D. Ill.), affirmed by the Seventh Circuit, April 28, 1949 (1949 C.C.H., par. 9289), certiorari denied, 337 U.S. 941, rehearing denied, 338 U.S. 840; *Wilson v. Wilson*, 141 F. 2d 599, 600 (C.A. 4th).

Since the issue underlying taxpayer's claim for declaratory relief is his alleged right to be relieved of the payment of part of his federal taxes, it is clear that the court lacked jurisdiction to consider this part of his claim.

B. *The District Court was without jurisdiction to enjoin the collection of federal taxes*

In his complaint taxpayer also asked for an injunction against "the collection of that part of plaintiff's Federal income tax for the years subsequent to 1952 that is budgeted for war purposes", and, in the alternative, that the District Court should order that fifty per cent of taxpayer's 1952 and subsequent taxes that "are budgeted for war and military preparation, be placed in the General Funds of the Treasury of the United States to be expended solely for peaceful and constructive purposes." (R. 21, 22.) The court below properly refused to grant such relief.

Section 7421(a) of the Internal Revenue Code of 1954, *supra*, provides as follows:

(a) *Tax*.—Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collec-

tion of any tax shall be maintained in any court.² This provision is similar to Section 3653(a) of the 1939 Code.

Although it has been held that this statutory prohibition against maintaining a suit to restrain the assessment or collection of any tax in any court may be relaxed, this has been permitted only under extraordinary and entirely exceptional circumstances, such as a showing that the conduct of the Government's agents in assessing a tax was arbitrary or oppressive and the assessment would cause irreparable injury to the taxpayer and the taxpayer did not have any adequate remedy at law. *Miller v. Nut Margarine Co.*, 284 U.S. 498, 509-510; *Graham v. DuPont*, 262 U.S. 234; *Allen v. Regents*, 304 U.S. 439, 449.

On the other hand, a claim on the part of a taxpayer that he does not owe a tax, or that it has been illegally and improperly assessed, or that the collection of the tax will result in hardship to him does not constitute grounds for the issuance of an injunction. If it were not so, the whole scheme of federal taxation would be frustrated. *California v. Latimer*, 305 U.S. 255; *Martin v. Andrews*, 238 F. 2d 552 (C.A. 9th); *Phelan v. Taitano*, 233 F. 2d 117 (C.A. 9th); *Monge v. Smyth*, 229 F. 2d 361, 366-367 (C.A.

² Sections 6212(a) and (c) and 6213(a) provide for the sending of deficiency notices for income, gift and estate taxes, and prohibit assessment and collection for the period thereafter during which taxpayer may petition for review by the Tax Court and while the Tax Court has the case under consideration.

9th), certiorari denied, 351 U.S. 976; *Mitsukiyo Yoshimura v. Alsup*, 167 F. 2d 104 (C.A. 9th); *Matcovich v. Nickell*, 134 F. 2d 837 (C.A. 9th); *Jewel Shop of Abbeville, South Carolina v. Pitts*, 218 F. 2d 692 (C.A. 4th); *Milliken v. Gill*, 211 F. 2d 869 (C.A. 4th); *Payne v. Koehler*, 225 F. 2d 103 (C.A. 8th), certiorari denied, 350 U.S. 904, rehearing denied, 350 U.S. 955; *Voss v. Hinds*, 208 F. 2d 912 (C.A. 10th); *Communist Party, U.S.A. v. Moysey*, 141 F. Supp. 332 (S.D. N.Y.); *Publishers New Press v. Moysey*, 141 F. Supp. 340 (S.D. N.Y.); *Schenley Distillers v. Bingler*, 145 F. Supp. 517 (W.D. Pa.). Even the asserted unconstitutionality of a taxing statute is not such an unusual circumstance as will afford a proper basis for an injunction. *Bailey v. George*, 259 U.S. 16; *Dodge v. Osborne*, 240 U.S. 118; *Reams v. Vrooman-Fehn Printing Co.*, 140 F. 2d 237 (C.A. 6th); *Voss v. Hinds, supra*.

Taxpayer's allegations (Br. 46-48), that the circumstances in the present case are sufficiently extraordinary to permit the granting of an injunction, rest solely upon the ground that his status as a conscientious objector would be lost if he were to pay his taxes, knowing that part of the taxes would be used for military purposes. He claims, in effect, that this would cause him irreparable injury even though he is presently too old to be subject to the draft, since Congress has the right to extend the draft age at any time to make him available for military service. Clearly, the extraordinary circumstances here alleged are far too speculative to warrant the granting of an injunction.

In the first place, it is clear that taxpayer had an adequate remedy at law to raise the question as to whether he must pay more than half of his taxes either by petitioning the Tax Court for a redetermination of the amount of the tax which he must pay or by paying the full amount of tax which the Commissioner claims is owing and filing refund claim and refund suit in the manner authorized by statute. In the present case there does not appear to have been any hardship for taxpayer to pay the small amount in dispute (\$103.15), as is shown by the fact of his tender of the full tax on his own terms, namely, that the fifty per cent in dispute be placed in the Treasury to be expended (R. 14) "for purpose of general welfare." (R. 21, 22.) That taxpayer failed to file a timely petition with the Tax Court, or a claim for refund before instituting this suit (see Part C, *infra*), does not negate the fact that these adequate remedies at law had been available to him.

Secondly, taxpayer admits that he presently is not subject to the draft. The assertion that Congress has the right to extend the draft age and might do so at some future time so as to encompass taxpayer's future age (his present age is approximately 49 (R. 23)), is far too speculative and remote to present such extraordinary circumstances as to warrant the issuance of an injunction.

Thirdly, taxpayer has not shown that filing a petition with the Tax Court (where he would not pay the balance of the tax prior to a determination by the Tax Court that he owes that amount), or utilizing the refund procedures, would deprive him of his

conscientious objector status. To the contrary, as we shall show, Part E, *infra*, it does not appear that any conscientious objector, whether or not he is currently subject to noncombatant training and service, is privileged to refuse to pay all of the taxes owed by him.

Finally, a requirement of compliance with the conditions precedent prescribed in the taxing statutes for rectifying errors in assessment or collection of taxes—either by petitioning for a redetermination of his taxes in the Tax Court, or by using the refund procedure—bears a procedural analogy to the methods available to a conscientious objector who seeks to adjudicate his status upon induction. Such a person does not have any privilege to defy the statutes and refuse to be inducted. Instead, the proper way for him to test his status as a conscientious objector is to be inducted and then to sue for a writ of habeas corpus. *Hirabayashi v. United States*, 320 U.S. 81, 108; *United States v. Niles*, 122 F. Supp. 382 (N.D. Cal.), affirmed, *per curiam*, 220 F. 2d 278 (C.A. 9th). Thus, taxpayer, having an adequate remedy at law to test the validity of taxes may not resort to the extraordinary injunctive process.

C. *The complaint failed to state a cause of action for refund of taxes*

In his complaint taxpayer also seeks a refund of \$103.15 of his 1952 taxes plus interest. (R. 21.) Nowhere in his complaint does taxpayer allege that he filed a timely claim for refund of this amount or any part of it. Accordingly, the District Court was correct on this phase of the case in granting the mo-

tion to dismiss for failure to state a claim upon which relief can be granted. (R. 46.)

The Government cannot be sued unless it gives its consent. Where it gives its consent, it can, however, prescribe the conditions upon which it can be sued, and these conditions must be complied with strictly. *Rock Island &c. R.R. v. United States*, 254 U.S. 141; *United States v. Michel*, 282 U.S. 656, 659; *Cheatham v. United States*, 92 U.S. 85, 89.

With respect to taxes, these conditions are found in Sections 7422(a) and 6511 of the Internal Revenue Code of 1954. Section 7422(a) of the Internal Revenue Code of 1954, *supra*, provides in relevant part as follows:

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

It is well settled, that, insofar as Congress imposes explicit statutory requirements for the recovery of taxes, they must be observed by the person seeking the recovery. Since Congress has provided that a claim for refund must be filed within a certain time, and that no suit can be maintained until a claim has been filed, a taxpayer's failure to file a timely claim prior to instituting a suit would bar any recovery of taxes paid by him. *Angelus Milling Co. v. Commis-*

sioner, 325 U.S. 293, 296; *United States v. Felt & Tarrant Co.*, 283 U.S. 269, 272; *Phelan v. Taitano*, 233 F. 2d 117, 119 (C.A. 9th); *United States v. Standard Oil Co.*, 158 F. 2d 126, 128 (C.A. 6th); *Davis v. United States*, 235 F. 2d 174 (C.A. 5th); *United States v. Knowles*, 235 F. 2d 176 (C.A. 5th); *Ertle v. United States*, 93 F. Supp. 619 (C. Cls.).

D. *The complaint failed to state a claim upon which relief can be granted since its allegations fail to set forth a justiciable controversy, and the District Court lacked jurisdiction*

Although taxpayer's cause of action was properly dismissed in all respects for the reasons given above, there are several additional grounds which support the District Court's order.

Article III, Section 1, of the Constitution vests the judicial power in the Supreme Court and such inferior courts as are established by Congress. Article III, Section 2, describes the "cases" and "controversies" to which the "judicial power" shall extend.

It has long been established that the jurisdiction of the District Courts is limited to that granted by statute within the scope of Article III, Section 2. *Lockerty v. Phillips*, 319 U.S. 182, 187.

The basis of taxpayer's claim for relief makes it apparent that it is outside the scope of the judicial power authorized under the Constitution, and the complaint failed to state a claim upon which relief can be granted. The gist of taxpayer's claim for relief appears to be that the federal revenues are being appropriated and expended for purposes for which taxpayer disapproves and which impinge upon the

free exercise of his religion.³ Regardless of the merits of his assertion, we submit that this does not present a justiciable controversy and is not, therefore, a "case" or "controversy" within the jurisdiction of the federal courts under Article III, Section 2, of the Constitution. This is so for two reasons—first, taxpayer does not have sufficient interest to bring suit against the Federal Government, in that he has not shown that he has sustained or is immediately in danger of sustaining some direct injury as a result of the enforcement of the taxing statute, and secondly, that taxpayer's suit raises a political rather than a justiciable question. *Massachusetts v. Mellon*, 262 U.S. 447; *Whetstone v. United States*, *supra*.

It should be noted that taxpayer does not dispute, aside from the effect of the alleged unconstitutional appropriations, that he is liable for the payment of income taxes under the statutes imposing such taxes. (Br. 15-16, 46-47; R. 9.) Secondly, taxpayer premises his case upon the assumption that the moneys received from income taxes are not earmarked or otherwise assigned either to the appropriations condemned by him or approved by him, but are covered

³ In its prayer for relief the complaint requests the following relief from the District Court (R. 22) :

In the alternative that this Court orders and adjudges that 50% of plaintiff's 1952 taxes that were budgeted and expended for war and military purposes, and such parts of his Federal income tax assessed for the years subsequent to 1952 that are budgeted for war and military preparation, be placed in the General Funds of the Treasury of the United States to be expended solely for peaceful and constructive purposes.

into the general funds of the Treasury. Sections 7808 and 7809 of the 1954 Code (26 U.S.C., 1952 ed., Supp. II, Secs. 7808, 7809). Thirdly, taxpayer does not allege what portion, if any, of the expenditures made under the asserted unconstitutional appropriations are traceable to or can be related to the moneys derived from his income taxes, and it is difficult to see how this could be determined. Instead, taxpayer admits that it is impossible to assign such a portion, so that he is arbitrarily assuming that one-half of his taxes are traceable to such appropriations. (R. 9-10.) Thus, taxpayer's right or standing to contest the constitutionality of the appropriations specified appears to be based on the assertion that the taxes here involved are, to some undetermined extent, reflected in the expenditures made under those appropriations.

In *Massachusetts v. Mellon supra*, the Supreme Court held that a similar claim did not present a justiciable controversy and was not, therefore, a "case" or "controversy" within the jurisdiction of the federal courts under Article III, Section 2, of the Constitution. That case involved two suits. One suit was brought by the State of Massachusetts on behalf of the state and as a representative of the citizens of the state. The other suit was brought by an individual taxpayer. Both suits were brought against the Secretary of the Treasury, the Chief of the Children's Bureau of the Department of Labor, the Surgeon General of the United States Public Health Service and the United States Commissioner of Education. The suits sought to enjoin the de-

fendants from the enforcement of the so-called "Maternity Act, authorizing appropriations to the states to reduce maternal and infant mortality and to protect the health of mothers and infants, on the ground that the Act was unconstitutional. In the individual taxpayer's suit she urged that (pp. 476-477, 480):

If these payments are made, this plaintiff will suffer a direct injury in that she will be subjected to taxation to pay a proportionate part of such unauthorized payments. She, therefore, has an interest sufficient under the practically uniform decisions of the courts of this country to enable her to maintain a proceeding to enjoin the making of these payments.

* * * *

* * * plaintiff alleges that the effect of the statute will be to take her property, under the guise of taxation, without due process of law.

The Supreme Court disposed of both cases for want of jurisdiction for the following reasons (pp. 487-489):

His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose

several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect.

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. *Gaines v. Thompson*, 7 Wall. 347. We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitu-

tional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.

See also *Whetstone v. United States*, *supra*; *Gange Lumber Co. v. Rowley*, 326 U.S. 295, 305; *Manne v. Commissioner*, 155 F. 2d 304, 307 (C.A. 8th); *Farmer v. Roundtree*, 149 F. Supp. 327 (M.D. Tenn.).

The applicability of *Massachusetts v. Mellon, supra*, to the present case is evident. In both cases the asserted right to bring suit and standing in court is predicated upon the fact that each plaintiff is a taxpayer; both taxpayers admit that they are otherwise subject to tax under the revenue laws; and the basis for relief rests upon the alleged unconstitutionality of appropriations derived from moneys raised by taxes paid by each taxpayer. Furthermore, taxpayer's allegation, that he might sustain injury if he were forced to pay half his tax through a possible loss of his conscientious objector classification, is, as we have shown, Part C, *supra*, without merit. Taxpayer is not currently subject to the draft, and he has not shown that, even if he were inducted into military service as a conscientious objector, he would not remain liable for all his federal taxes. Thus, the very reason given by the Supreme Court for dismissing the suit in *Massachusetts v. Mellon, supra*, is equally applicable to taxpayer's present suit.

In any event, the constitutionality of legislation is presumed, and taxpayer has not even alleged that any part of the particular sums which he paid *actually* can be traced to expenditures for military purposes. Until he establishes that some part of the tax money collected from him was used in fact for such purposes, he has not shown that the revenue statutes were invalid restrictions upon the exercise of his religion, even on the premises upon which he bases his argument. But, as discussed in Subpoint E, *infra*, these premises are themselves completely invalid.

E. *In imposing the income tax and providing for its collection Congress made no law respecting establishment of religion nor prohibiting the free exercise thereof in violation of the First Amendment to the Constitution*

The gravamen of taxpayer's complaint appears to be that the pertinent provisions of the Internal Revenue Code of 1939 and the Internal Revenue Code of 1954 which impose and authorize collection against him of the income tax constitute infringement of the First Amendment to the Constitution on the ground that these are statutory provisions prohibiting him in the free exercise of religion. Taxpayer does not contend that the statutes in question are unconstitutional as attempts to establish, license or regulate religion. The attack centers upon the claims that payment of the taxes, to the extent that they are spent for war purposes, involves on his part violation of his religious principles in objection to war in any form, and that to compel him to pay taxes under the circumstances is to compel him to act contrary to his religious convictions. Thereby he concludes and argues throughout his brief that the taxing statutes in question are violative of the First Amendment.⁴ On the other hand, it is our contention that as a matter of law the allegations of the complaint on their face fail to state a claim that the statutes in question are unconstitutional. Hence, in addition to the reasons already given in the four preceding subpoints, on

⁴ It is not clear from the record that taxpayer's alleged religious objection to paying the full income tax represents the belief of the Quakers or of any other religious body or sect or anything except his individual view.

this ground alone the cause was properly dismissed by the District Court.

It has long been held that the Government's power to levy and collect taxes is all embracing under Article I, Section 8, of the Constitution, and that other provisions of the Constitution are not a limitation upon the tax powers, except in the rare and special instance where the tax statute is, "so arbitrary as to compel the conclusion that it does not involve an exertion of the tax power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." *Magnano Co. v. Hamilton*, 292 U.S. 40, 44. In *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, the Supreme Court has stated (p. 12):

That the authority conferred upon Congress by § 8 of Article I "to lay and collect taxes, duties, imposts and excises" is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine.

See *Steward Machine Co. v. Davis*, 301 U.S. 548; *McCray v. United States*, 195 U.S. 27; *Kitagawa v. Shipman*, 54 F. 2d 313 (C.A. 9th).

A person may not claim exemption from the general burden of property and income taxation on the ground of religion. The First Amendment surely does not prohibit Congress from imposing general non-discriminatory taxes. *Grosjean v. American Press Co.*, 297 U.S. 233, 250; *Follett v. McCormick*, 321 U.S. 573, 577-578; *Murdock v. Pennsylvania*, 319

U.S. 105, 112; *Associated Press v. Labor Board*, 301 U.S. 103, 132-133. See *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 192-194; *Associated Press v. United States*, 326 U.S. 1, 7; *Lorain Journal v. United States*, 342 U.S. 143, 155-156; *Labor Board v. Virginia Power Co.*, 314 U.S. 469, 477. The tax here is not in any way laid on the exercise of religion nor does it seek to regulate or license that exercise nor is it imposed as a condition to the exercise of the religious liberties guaranteed by the First Amendment. The tax to which objection is here made was plainly imposed without discrimination upon all persons generally and is not directed to any religious activity.

In *Butler v. Kavanagh*, 64 F. Supp. 741, 745 (E.D. Mich.), affirmed, *per curiam*, 156 F. 2d 158 (C.A. 6th); in *Mormon Church v. United States*, 136 U.S. 1; and in *Shapiro v. Lyle*, 30 F. 2d 971 (W.D. Wash.), statutes which placed a tax upon oleomargarine, which prohibited the practice of polygamy, and which restricted the amount of wine permitted to those of the Jewish faith for sacramental purposes were held not to prohibit the free exercise of religion. In *Jacobson v. Massachusetts*, 197 U.S. 11, it was held that an individual cannot claim freedom from compulsory vaccination on religious grounds. In *Watchtower Bible & Tract Soc. v. Los Angeles County*, 181 F. 2d 739, certiorari denied, 340 U.S. 820, this Court held that a California personal property tax which was imposed alike on property of all taxpayers, including religious literature distributed by the Jehovah's Witnesses, was held not to be uncon-

stitutional as infringing on freedom of religion and press guaranteed by the First and Fourteenth Amendments. See *Communist Party, U.S.A. v. Moysey*, *supra*; *Publishers New Press v. Moysey*, *supra*.

Moreover, as the cases cited in the preceding paragraphs show, it has long been settled that the rights protected by the First Amendment are not absolutes and do not have the effect of permitting every citizen to be a law unto himself under the guise of even sincere religious belief. The special treatment afforded conscientious objectors with respect to military service, it is well established, does not arise from the Constitution but from Congress; it was not required by the First Amendment but, to the extent allowed, existed through the grace and in the wisdom of Congress. *Richter v. United States*, 181 F. 2d 591 (C.A. 9th), certiorari denied, 340 U.S. 892; *George v. United States*, 196 F. 2d 445 (C.A. 9th), certiorari denied, 344 U.S. 843. Furthermore, a conscientious objector does not avoid all military service; on the contrary he may be required to serve in the armed forces in a non-combative status. Universal Military Training and Service Act, c. 625, 62 Stat. 604, Sec. 6 (j), as amended by 1951 Amendments to the Universal Military Training and Service Act, c. 144, 65 Stat. 75; Sec. 1 (50 U.S.C. App., 1952 ed., Sec. 456). As Mr. Justice Cardozo pointed out in his concurring opinion ⁵ in *Hamilton v. Regents*, 293 U.S. 245, 266:

From the beginnings of our history Quakers

⁵ In this opinion Mr. Justice Brandeis and Mr. Justice (later Chief Justice) Stone joined with Mr. Justice Cardozo.

and other conscientious objectors have been exempted as an act of grace from military service, but the exemption, when granted, has been coupled with a condition, at least in many instances, *that they supply the army with a substitute or with the money necessary to hire one.* [Italics supplied.]

Surely, since it is well established that the First Amendment does not prohibit Congress from enacting legislation requiring conscientious objectors to supply personal physical service or the army with a substitute soldier or with the money necessary to hire one, the First Amendment does not prevent Congress from raising money through taxation for the general support of the Government including the defense of the nation. As Mr. Justice Cardozo further stated in the same opinion (p. 268):

Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

Surely, no citizen may decide for himself under the guise of religion for what purposes the public

moneys may or may not be spent or whether or not he will contribute the share imposed by Congress because he disapproves of the purpose for which it might be used.⁶

CONCLUSION

For the reasons stated, the order and judgment of the District Court dismissing taxpayer's cause were correct and should be affirmed by this Court.

Respectfully submitted,

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October, 1957.

⁶ As we have pointed out, *supra*, and contrary to taxpayer's contention (Br. 26-27), the statute does not make any invidious classification in favor of conscientious objectors of draft age. All conscientious objectors, whether or not they are serving in the armed forces, must pay their taxes.

No. 15,594

IN THE

United States Court of Appeals
For the Ninth Circuit

MILTON MAYER,

Appellant,

VS.

ERNEST WRIGHT, Regional Commissioner of Internal Revenue Service and HAROLD HAWKINS, District Director, Internal Revenue Service,

Appellees.

Appeal from the United States District Court for
the Northern District of California,
Southern Division.

Honorable Louis E. Goodman, Trial Judge.

APPELLANT'S OPENING BRIEF.

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FILED

OCT 20 1957

U.S. COURT OF APPEALS
NINTH CIRCUIT



Subject Index

	Pages
Jurisdiction	1-2
Statement of the case	3-12
Facts	3-10
Questions involved	10-12
Specification of errors	12
Statutes involved	13
Argument	14-48
Preliminary remarks	14
Summary of argument	15-16
I. As a matter of law, is a conscientious objector to war in any form, who is not of draft age, entitled to the same exemption as conscientious objectors of draft age, and, therefore, is he to be relieved of the payment of that part of Federal Income Tax that is used for the purpose of and preparation for war?	17-24
II. As a matter of law, is the exemption from military service given to conscientious objectors of draft age and the refusal to exempt objectors beyond draft age from their part in military preparation, class legislation forbidden by the Constitution of the United States?	25-28
III. As a matter of law, is the forcible collection of that part of the taxes that are spent for war purposes, from one who because of religious belief and training is opposed to war in any form, contrary to the First Amendment to the Constitution of the United States?	28-31
IV. The courts have held that contribution to war in any substantial form, prior to induction, is in conflict with the claim of conscientious objection to military service. As a matter of law, will a conscientious objector lose his status as such if he so pays that part of his taxes that is spent for war preparation, because payment of such tax is contribution to war in a substantial form?	31-36

	Pages
V. The draft age is subject to Congressional change, and therefore, one who is beyond draft age may become subsequently subject to draft. As a matter of law, will a conscientious objector beyond draft age who, prior to being conscripted, pays that part of his taxes that is spent for war purposes, become subject to military service if the draft age is raised, because his contribution to war in the form of his tax payment deprived him of his claim to be recognized as a conscientious objector to war?	36-43
VI. As a matter of law, is a conscientious objector to war in any form, who is beyond draft age, entitled to a declaration of his rights with reference to his refusal to pay that part of his taxes that are spent for war purposes?	43-45
VII. As a matter of law, is a conscientious objector to war in any form, who refuses to pay that part of his taxes that is spent for war purposes, entitled to a restraining order against forcible attempt to collect such tax?	45-48
The question of necessary parties	48-49
Conclusion	49-50

Table of Authorities Cited

Cases	Pages
Bernstein v. Herren, 136 F. Supp. 493	48
Board of Education v. Barnette, 319 U.S. 624	27, 30
Cadwalader v. Sturgess, 297 F. 73	45
Cantwell v. Connecticut, 310 U.S. 296, 303-4	28, 29, 30
Davis v. Beason, 133 U.S. 333, 342 (1890)	21, 29, 30
Excelsior Life Ins. Co. v. Thomas, 49 F. Supp. 90 (1943) ..	44
Hamilton v. Regents, 263 U.S. 245, 268 (1934)	19, 22, 30
Holland v. Nix, 214 F. 2d 317 (1954)	46
Hudson v. Cranshaw, 130 Fed. Supp. 166	44
In re Clyde Wilson Summers, 325 U.S. 561	36, 43
Jacobson v. Massachusetts, 197 U.S. 11	20, 21, 30
Levin v. Gillespie, 121 F. Supp. 726	49
Miller v. Nut Manufacturing Co., 284 U.S. 498, 52 S. Ct. 260	47
Moore v. United States, 217 F. 2d 428	31, 33, 34, 36, 44
Moore v. United States, 348 U.S. 966	31, 32, 34
United States v. Ballard, 322 U.S. 78, 86	30
United States v. Girourard, 328 U.S. 61	27, 30
United States v. MacIntosh, 283 U.S. 605, 625	29
United States v. Schwimmer, 279 U.S. 644	30
Williams v. Fanning, 332 U.S. 490	49
Witmer v. United States, 75 S. Ct. 392	31, 35, 36, 44
Work v. United States, ex rel. Rives, 276 U.S. 175	49

Constitutions, Statutes and Other Authorities

Constitution of Illinois, 1870, Art. XII, Sec. 1	13, 39
First Amendment to the Constitution of the United States	2, 13, 19, 20, 23, 28, 30

	Pages
Fourteenth Amendment to the Constitution of the United States	13, 19, 27
Internal Revenue Code, Section 3653	45
55 Stat. 1600	13, 23
50 App. U.S.C., Sec. 451 et seq.	2, 13, 23, 25, 27, 44
26 U.S.C., Sec. 7421	13, 45
28 U.S.C., Sec. 272(a) and 3653(b)	2, 13
28 U.S.C., Sec. 1291 and 1294	2, 13
28 U.S.C., Sec. 1431 et seq.	2, 13
28 U.S.C., Secs. 2201-2 (1952)	2, 13, 43
32 U.S.C., Sec. 1622.14	2, 13
Meiklejohn, Alexander, Free Speech and Its Relation to Self-Government (Harper 1948)	19

No. 15,594

IN THE

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MILTON MAYER,

Appellant,

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ERNEST WRIGHT, Regional Commissioner of Internal Revenue Service
and HAROLD HAWKINS, District Director, Internal Revenue Service,

Appellees.

**Appeal from the United States District Court for
the Northern District of California,
Southern Division.**

Honorable Louis E. Goodman, Trial Judge.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

This is an appeal from an order of the Trial Court granting Appellees' Motion to Dismiss (Tr. 46, 47) and dismissing the cause (Tr. 47).

The District Court had jurisdiction of the issues raised by the Complaint for Declaratory Judgment and for Injunction (Tr. 3-44) under the laws and the

Constitution of the United States; the Declaratory Judgments Act (28 U.S.C.A. Sec. 2201-2); the Injunction Act (28 U.S.C.A. Sec. 272(a) and 3653(b)). The jurisdiction of the District Court arose particularly under the First Amendment to the Constitution and also under Title 32, National Defense Chapter XVI, Selective Service System, Par. 1622.14 (32 C.F.R. Sec. 1602 et seq.).

The District Court had jurisdiction of the issues raised by Complaint also under the Universal Military Training and Service Act (50 App. U.S.C.A. Sec. 451 et seq.) and further under Title 28, U.S.C.A. Sec. 1431, et seq. (Tr. 3, 4, 13, 14, 17-20.)

The jurisdiction of the District Court was invoked by the Complaint under the Constitution and the above Statutes on the ground that Appellant is and was a conscientious objector to war in any form, and that payments of those parts of his income taxes that were used for war purposes and military preparation are contributions to war, contrary to his conscience. (Tr. 4-16.) Appellant was compelled by Appellees to pay the full amount of his taxes (Tr. 16, 17) and for the purpose of obtaining a Declaration of his rights and for the purpose of restraining the Appellees from further collection of the war-designated parts of his taxes, this cause was instituted. (Tr. 20-22.)

The order of the District Court (Tr. 47), while not stating so, must be assumed to be tantamount to holding that the Court has no jurisdiction.

This Court has jurisdiction of this appeal under 28 U.S.C. 1291 and 1294.

STATEMENT OF THE CASE.**Facts.**

The facts presented by the Complaint are not and cannot be in dispute, since the cause was dismissed on defendants' motion to dismiss. (Tr. 47.)

The plaintiff is a citizen of the United States, residing in the State of California. (Tr. 4.) Defendants are sued in their official capacity, Wright as Regional Commissioner of Internal Revenue, San Francisco Region, Hawkins as District Director of Internal Revenue Service of San Francisco. (Tr. 4.)

Plaintiff, because of his religious training and belief, is and was for years past conscientiously opposed to participation in war or in military preparation. (Tr. 4.) His conscientious objection is emanating from his belief in a Supreme Being. (Tr. 4.) He gave oral and written expression of his conscientious objection to war and to military preparation during the past sixteen (16) years, or more. (Tr. 4.)

Among the written statements that plaintiff made about his position as a conscientious objector to war is an article printed in the Saturday Evening Post of October 17, 1939 (Tr. 5 and Exhibit "A"); one in the Christian Century of July 12 and 19, 1944 (Tr. 5, Exhibits "B" and "C"); one in The Commonwealth of October 23, 1953 (Tr. 5, 6 and Exhibit "D").

Plaintiff attended regularly since about 1940 Meeting for Worship of the Religious Society of Friends (Quakers). (Tr. 6.) He is an active participant in the activities of the Friends Meetings and leading

Quakers of the country recognized plaintiff's lectures, articles, etc. as expressing the Quakers' pacifist position. (Tr. 6.) Plaintiff lectured extensively since 1940 for the Quakers, both here and abroad. (Tr. 6.)

Plaintiff was and is a member of various pacifist organizations and, as a member of the Peacemakers and in witness of his conscientious objection to war, he returned his Selective Service Classification Card to the President of the United States. (Tr. 6, 7.)

When in 1941 his local Selective Service Board refused plaintiff's request to be classified as a conscientious objector to war, he informed said Board that if called upon he would be unable to serve, either in combatant or in noncombatant capacity. (Tr. 7.)

Plaintiff, having reached the age beyond which the Selective Service System has no jurisdiction over him, felt compelled to continue his refusal to participate in war or in preparation therefor in any form. In consequence, he informed the Internal Revenue Service of his inability in conscience to pay that part of his Federal Income Tax which is budgeted for purposes of war or military preparation. (Tr. 7.) It was in 1948 when he first expressed his refusal to contribute to war or military preparation by payment of the military portion of his Federal Income Tax, and he so wrote to the President of the United States. (Tr. 8.)

In January, 1953, while plaintiff resided in the City of Chicago, he wrote to the Collector of Internal Revenue of that city, explaining why he, as a con-

scientious objector, was unable to pay that part of his Federal taxes that are budgeted and expended for war purposes. (Tr. 8.) He paid with his United States Individual Income Tax Return for 1952 "50% of the tax claimed due, in the amount of \$99.38". (Tr. 8.)

With reference to the payment of \$99.38, plaintiff wrote to the Collector of Internal Revenue that the same is one-half ($\frac{1}{2}$) of his 1952 tax due, i.e. \$198.78, and that "he cannot" as a religious objector to military service

"perform the military service here asked of me—the purchase of armaments . . . I accept gladly my obligation to maintain its (Government's) free and peaceful institutions however large a share of my earnings they require. If you will inform me of any means whereby I may do so through payment to the Treasury Department, I shall immediately remit such payment in the amount of the balance deemed due in Income Tax for 1952 . . . I do not wish to contend with my Government, least of all in the matter of percentages. I have, therefore, taken the obviously conservative figure of 50 as that percentage of the current United States Budget now used for the purchase of armaments, and I have calculated my Income Tax payment for 1952 accordingly." (Tr. 9, 10.)

In August 1953 the Chicago District Director acknowledged the receipt of \$99.38, but also advised plaintiff that the laws and regulations provide no relief from payment of tax on the grounds advanced by him. The Internal Revenue Department

demanded payment of the withheld one-half ($\frac{1}{2}$) of plaintiff's 1952 tax, "less the payment of March 16, 1953 in the amount of \$66.00." (Tr. 10.)

(The credit of \$66.00 represents an involuntary payment. (Tr. 10, Exhibit "E".))

Plaintiff received two notices from the Internal Revenue Service (Tr. 10) both in 1953 and referring to the tax withheld by him in the amount of \$32.78. (Tr. 11.) After a conference in the Chicago Collection Office, plaintiff wrote again to the Revenue Service that:

"The \$32.78 (plus interest) claimed by Government and acknowledged due in my 1952 income tax return and the letter which accompanied it, I have withheld on principle and as a protest against the Government's expenditure of most of its revenues for the destructive purposes of militarism and war.

I contest the Government's claim, not to the money but the use to which it puts the money . . . I will gladly pay the amount claimed (plus interest) if it can be allocated to any constructive public purpose. If there is any way in which this can be done, I shall appreciate being informed . . ." (Tr. 11.)

The Chicago District Director answered plaintiff and accepted plaintiff's statement that his refusal to pay that part of his taxes which were to be used for war purposes was based on his conscientious objection to war in any form; however, since "the law provides no relief from payment of the tax on such grounds"

the Director found no alternative but to proceed with the collection of the \$32.78 (plus interest). (Tr. 12.)

A Warrant of Distrainment was issued against the plaintiff from the Director of Internal Revenue, Salinas, California (plaintiff at that time resided in Carmel, California (Tr. 12)). The amount of taxes due for 1952 was \$32.78 and interest thereon amounted to \$2.50 for a total claim of \$35.28. (Tr. 12 and Exhibit "F".)

On May 29, 1954, plaintiff wrote to the Salinas Office of the Revenue Service, restating that the non-payment of part of his 1952 taxes was a matter of principle directed against the war-spending of part of the taxes and asked that the execution of the Warrant of Distrainment be postponed until he had a chance to present a brief in support of his position to the Commissioner of Internal Revenue. (Tr. 13 and Exhibit "G".)

Plaintiff's brief to the Commissioner (August 15, 1954) stated that:

"I am a conscientious objector to participation in war, and have been publicly identified as such since 1939. I have come to the conclusion that I can not, in conscience, and in love of my country, encourage my country's government to spend my country's substance in the killing of my innocent fellow-men anywhere, or in preparation for killing them, or in preparing any fellow-Americans of military age to kill or to be killed . . .

The \$32.78 plus \$2.50 interest claimed by the Internal Revenue Service in the present matter

represents 50% of the balance due, as of March 15, 1953, of my 1952 income tax. I withheld 50% of the amount claimed on the basis that at least 50% of my income tax is used for purposes which I can not in conscience support . . ." (Tr. 13, 14 and Exhibit "H".)

Plaintiff in his brief to the Commissioner (Exhibit "H") requested that the Government

" . . . make it possible for me to pay the full amount of my income tax in conscience. I wish to pay the amount claimed, and any and all other amounts my Government may claim, for any and all purposes which I can recognize, in simple conscience, as consistent with or conducive to the general welfare. If the amount claimed here can be so paid in, and so used, I shall pay it not only voluntarily, but gladly.

Until this protest of mine can be resolved, either by my Government's allowing me to pay the full amount of my taxes for purposes of general welfare, or by legal proceedings in which I may challenge my Government's right to tax me against my conscientious and religious precepts . . ." (Tr. 14, 15 and Exhibit "H"),

he asked that the Warrant be withheld.

Plaintiff's brief (Exhibit "H") was answered by the Treasury Department on September 2, 1954, stating:

" . . . appreciates the sincerity of your views in this matter, the federal income tax laws . . . apply uniformly to every individual . . ." (Tr. 15.)

Plaintiff received no relief from the Treasury Department, nor from the District Director of Internal Revenue. To the contrary, the defendants obtained from plaintiff information as to names and addresses of his employers, proceeded and did collect on March 4, 1955 the sum of \$36.55. (Tr. 16, 17 and Exhibit "F".)

Plaintiff claims that the action of the defendants in collecting said tax was in violation of the Constitution of the United States and laws made thereunder.

Plaintiff's complaint (Tr. 3-22) asked that the court declare his rights under the issues raised (Tr. 20). He asked that the defendants be ordered to refund the sums of \$36.55 and \$66.60, as having been collected illegally; that the defendants and all others acting pursuant to their direction be restrained from attempting to collect from him for the years subsequent to 1952 that part of his Federal income tax that is budgeted for war purposes. (Tr. 21.)

Plaintiff's complaint had attached to it his lawyer's affidavit. (Tr. 43-44.)

On the date of the filing of the Complaint (i.e. December 17, 1956) the District Court issued an Order to Show Cause and Temporary Restraining Order. (Tr. 45, 46.) Pursuant to this Order the defendants were to appear before the Honorable O. D. Hamlin, one of the Judges of the District Court on the 27th of December, 1956, then and there to show cause why

a preliminary injunction should not issue as prayed for in the complaint. (Tr. 45, 46.)

Defendants filed on February 15, 1957 their Notice of Motion to Dismiss, to be heard on March 4, 1957 (heard in fact on March 18, 1957). (Tr. 46.)

Defendants moved for the dismissal of the action on four grounds:

(1) The complaint fails to state a claim upon which relief can be granted.

(2) and (3) The court lacks jurisdiction, since the action is for declaratory relief with respect to Internal Revenue Taxes, and is for an injunction to restrain collection of Federal income taxes.

(4) Indispensable parties are not joined. (Tr. 46, 47.)

On March 18, 1957, the trial judge, the Honorable Louis E. Goodman, granted defendants' Motion to Dismiss and ordered that the cause be dismissed. (Tr. 47.)

Plaintiff filed his Notice of Appeal (Tr. 48), his Cost Bond (Tr. 48, 49), his Statement of Points (Tr. 52, 53), and Designation of Record (Tr. 53, 54).

Questions Involved.

1. As a matter of law, is a conscientious objector to war in any form, who is not of draft age, entitled to the same exemption as conscientious objectors of draft age, and, therefore, is he to be relieved of the payment of that part of Federal Income Tax that is used for the purpose of and preparation for war?

2. As a matter of law, is the exemption from military service given to conscientious objectors of draft age and the refusal to exempt objectors beyond draft age from their part in military preparation, class legislation forbidden by the Constitution of the United States?

3. As a matter of law, is the forcible collection of that part of the taxes that is spent for war purposes, from one who because of religious belief and training is opposed to war in any form, contrary to the First Amendment to the Constitution of the United States?

4. The courts have held that contribution to war in any substantial form, prior to induction, is in conflict with the claim of conscientious objection to military service. As a matter of law, will a conscientious objector lose his status as such if he so pays that part of his taxes that is spent for war preparation, because payment of such tax is contribution to war in a substantial form?

5. The draft age is subject to Congressional change, and therefore, one who is beyond draft age may become subsequently subject to draft. As a matter of law, will a conscientious objector beyond draft age who, prior to being conscripted, pays that part of his taxes that is spent for war purposes, become subject to military service (if the draft age is raised) because his contribution to war in the form of his tax payment deprived him of his claim to be recognized as a conscientious objector to war?

6. As a matter of law, is a conscientious objector to war in any form, who is beyond draft age, entitled to a declaration of his rights with reference to his refusal to pay that part of his taxes that are spent for war purposes?

7. As a matter of law, is a conscientious objector to war in any form, who refuses to pay that part of his taxes that is spent for war purposes, entitled to a restraining order against forcible attempt to collect such tax?

SPECIFICATION OF ERRORS.

1. The trial court erred in ordering that the complaint be dismissed on the ground that it failed to state a claim against defendants upon which relief can be granted. (Tr. 46, 47 and 52.)

2. The trial court erred in dismissing the complaint for lack of jurisdiction in an action for declaratory judgment with respect to Internal Revenue Taxes. (Tr. 46, 47 and 52.)

3. The trial court erred in dismissing the complaint for lack of jurisdiction in an action for a restraining order against collection of Federal Income Tax. (Tr. 46, 47 and 52.)

4. The trial court erred in dismissing the complaint directed against the Regional Commissioner and the District Director of Internal Revenue, on the ground that the plaintiff failed to join unnamed, indispensable parties.

STATUTES INVOLVED.

Plaintiff claims that under the Constitution of the United States and particularly under the First Amendment thereto, Congress cannot make a law which in effect prohibits him from exercising his religion freely.

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .”

First Amendment to the Constitution of the United States.

Plaintiff claims that he is entitled to the same recognition as a conscientious objector as that given to those of draft age. In absence thereof the Universal Military Training and Service Act becomes class legislation forbidden by the Constitution.

Title 50 App. U.S.C.A., Sec. 451 et seq.

See also:

55 Stat. 1600 (Declaration by United Nations and The Atlantic Charter);

Fourteenth Amendment to the Constitution of the United States;

Constitution of Illinois, 1870, Art. XII, Sec. 1, amended;

26 U.S.C.A., Sec. 7421:

28 U.S.C.A., Secs. 272(a) and 3653(b);

28 U.S.C.A., Secs. 1291 and 1294;

28 U.S.C.A., Sec. 1431 et seq.;

28 U.S.C.A., Secs. 2201-2;

32 U.S.C.A., Sec. 1622, 14.

ARGUMENT.**PRELIMINARY REMARKS.**

The Transcript of Record is silent as to any one of the grounds upon which the trial court dismissed the cause. The order of March 18, 1957 (Tr. 47) grants defendants' motion to dismiss the cause and dismisses the cause without specifying the ground for such order.

Defendants' Notice of Motion to Dismiss (Tr. 46, 47) indicates that they will move the court to dismiss the complaint on four grounds. The order of the court dismissing the cause could have been therefore bottomed on any one of four grounds raised by the defendants. It could have been bottomed on all, or on any combination of the four points raised. Since plaintiff is not advised which one of the four grounds raised by defendants was the basis of the trial court's order of dismissal, he will have to assume that all four reasons were accepted by the court. Because of that plaintiff will have to argue against all four points of defendants' motion to dismiss.

It is proposed that plaintiff in this brief first argues the positive points raised by his complaint to show this court why the prayers of the complaint should have been granted and why the trial court, in denying them, was in error. Thereafter, wherever it is necessary to overcome defendants' reasons which were the basis of their motion to dismiss, plaintiff will present argument in opposition thereof and for the purpose of showing why the trial court erred in granting said motion and dismissing the cause.

SUMMARY OF ARGUMENT.

Plaintiff is a religious objector to war and to any form of preparation for it. His conscientious objection is of long standing and because of lectures and writings on this subject, his position is and was well known in this country and abroad. His pacifist position is recognized and accepted as that representing the pacifist position of the Society of Friends (Quakers) who requested plaintiff to, and he did, lecture on the subject matter of religious objection to war for and on behalf of the Quakers here and abroad. Plaintiff was for years and is now active in various religious pacifist organizations.

During the war of 1941-1945, and while still of draft age, plaintiff informed his Draft Board that because of his religious training and belief he was opposed to participation in the war in any form, and that if he be called to perform military service, would decline to do so either as a combatant or as a non-combatant.

Upon reaching the age beyond which one, under the Military Training and Service Act, is not liable to military service, plaintiff prompted by his conscience that prevents him to participate in war or in preparation therefor in any form, declined to pay that part of his Federal Income Tax that is budgeted and spent for military purposes, though he offered to pay his taxes in full provided he can do so for constructive purposes. He requested the Internal Revenue Service and the defendants that they make it possible for him to pay his taxes towards positive

national expenditures and not towards destructive war purposes. The department, while recognizing plaintiff's sincerity as a religious objector to war, failed to extend to him the relief asked for, but to the contrary, collected from him, pursuant to a Warrant of Distrainment, the sum of \$99.78 (plus interest) i.e. the amount that plaintiff withheld on the basis of 50% of his 1952 Income Tax, which 50% plaintiff calculated as being expended for war purposes.

Plaintiff contends that as one who religiously objects to participation in war and to preparation therefor in any form, ought not and under the Constitution cannot be compelled to contribute to military operations by forcing him to finance them with his taxes.

Plaintiff also contends that payment by him of that part of his Income Tax that is expended for war purposes, would deprive him of his status of a conscientious objector to war, since such payment contributes significantly to the war effort.

Plaintiff finally contends that he is entitled to a declaration of his rights as a religious objector to war with reference to the payment of that part of his Income Tax that is budgeted by Congress for war preparation and is expended by the military for such purpose. He maintains that he is entitled to an order for the return to him of the 1952 tax money forcibly collected from him and to an injunction restraining the defendants from collecting from him that part of his Federal Income Tax for the years subsequent to 1952 that are budgeted and expended for war purposes.

I.

AS A MATTER OF LAW, IS A CONSCIENTIOUS OBJECTOR TO WAR IN ANY FORM, WHO IS NOT OF DRAFT AGE, ENTITLED TO THE SAME EXEMPTION AS CONSCIENTIOUS OBJECTORS OF DRAFT AGE, AND, THEREFORE, IS HE TO BE RELIEVED OF THE PAYMENT OF THAT PART OF FEDERAL INCOME TAX THAT IS USED FOR THE PURPOSE OF AND PREPARATION FOR WAR?

The First Amendment to the Constitution of the United States directs that

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .”

Plaintiff maintains that if this Amendment means anything, it means that no one, not even Congress, has the power to prevent him to *exercise* his religion freely. And that is as it ought to be in a free society where the people are the sovereign and all instrumentalities of the Government are the servants of the sovereign. The Amendment ought not and does not mean that one may have a religious belief but be estopped by the law from living according to that belief. The Amendment surely did not contemplate making the people of this country Sunday-Christians (or Sabbath-Jews, or Friday-Mohammedans) who are to act during the week contrary to their Sunday belief. On the contrary, the Amendment assured to everyone “the free exercise of” his religion. Plaintiff asks for no more (but cannot accept anything less) than the right to live his life in accordance with his religious belief; that he may not be interfered with by defendants when he in fact “exercises” his religion.

Plaintiff is, because of religious training and belief, conscientiously opposed in the past and is opposed now to participation in war or in military preparation. His objection to war and to the underlying preparation, dates back many years, emanating from his belief in a Supreme Being. (Tr. 4.) He has given expression to his conscientious objection to war and to military preparation, both orally and in writing, for about two decades. (Tr. 4, Exhibits "A"- "D".)

Plaintiff believes that the Sixth Commandment means just what it says: "Thou shalt not kill". He believes that this means not to kill by any means, at any time, either directly or indirectly. It means that one ought not to kill by heaving a stone, using a spear, a boomerang, a blow-gun, nor a cannon, and least of all an atomic bomb. He believes that raising a loaded gun, directing it against another human being and pulling the trigger to propel the bullet into a living heart of another is killing, forbidden by the Lord's command. He also believes that putting the self-same gun into the hands of another man means to do the killing vicariously, but just as effectively as done by himself. He cannot kill and he cannot buy the guns, nor the bullets, nor the atomic bombs, because in doing so he would do the killing forbidden to him by his conscience.

Plaintiff's position is just as unsophisticated as that. He knows that the Congress of the United States budgets, conservatively stated, 50% of all Federal Income Taxes for war purposes. (Tr. 14.) He knows that at least 50% of his Federal Income Tax is ex-

pended to buy guns, cannons, atomic bombs and other instruments of destruction. (Tr. 8, 9, 10, 11, 13, 14.) As one who conscientiously objects to war and to preparation therefor, plaintiff cannot perform military service in the form of "purchasing armaments." (Tr. 9.) Because of such religious prompting plaintiff withheld 50% of his 1952 income tax. (Tr. 9.) He offered to pay his tax in full if it is used to maintain his country's "free and peaceful institutions". (Tr. 9.) His offer was rejected by defendants, who, while recognizing plaintiff's sincerity, proceeded forceably to collect that part of his 1952 taxes that he refused to pay for the reasons given above. (Tr. 15, 17.)

We are aware that Justice Cardozo in the case of *Hamilton v. Regents*, 263 U.S. 245, 268 (1934) delivered a *dictum* that is opposed to plaintiff's position. We know that the *dictum* of Justice Cardozo frowns upon the exaltation of private judgment "above the powers and the compulsion of the agencies of the Government." Nevertheless, we respectfully submit that the *dictum* of Justice Cardozo is based on a total misconception of both the sovereign right of the people and of the purport of the First Amendment. The true meaning of the First Amendment is disclosed by the non-legalistic understanding presented by Professor Alexander Meiklejohn¹ who compares the Fifth Amendment with the First and concludes that the framers

¹Free Speech and its Relation to Self Government, Alexander Meiklejohn (Harper & Bros. Publishers 1948).

“of the Constitution intended by the First Amendment to provide an ‘unlimited guarantee of freedom of speech’ [and obviously of the free exercise of religion]. The First Amendment:

‘... correlating the freedom of speech in which it is interested with the freedom of religion, of press, of assembly, of petition for redress of grievances, places all these alike beyond the reach of legislative limitation—beyond even the due process of law. With regard to them, Congress has no negative powers whatever.’ ”

Professor Meiklejohn, discussing the basis of the Constitution, namely, the compact between the sovereign, the people, and the government, concludes that the freedoms guaranteed by the First Amendment and the injunctions directed to Congress are “The basic postulate of a society which is governed by the votes of its citizens.”

We know that the courts have held that the exemption of the conscientious objector from military service is not a right, but a “grant” from Congress, nevertheless, we submit that in such a holding there is a basic misconception as to the right of the sovereign, i.e., the people. It may be that a reconsideration is urgently in order, before freedom perishes through this doctrine that the servant may grant certain rights to the master or withhold them from him.

We know that in *Jacobson v. Massachusetts*, 197 U.S. 11, it was held that a religious objector to war may be compelled, “by force if need be, against his will . . . to take his place in the ranks of the army of

his country, and risk the chance of being shot down in its defense." However, not even the court can say that one can be forced against his will to kill anyone. Nor do we read the *Jacobson* case to say that one may be compelled to contribute his money so that others may be provided with instruments of killing. The only thing that we glean from the *Jacobson* case is the holding that the "country" may compel one to stand up and be killed in its defense. We do not understand how much or how good such "defense" may be, nor do we understand how this holding squares with the one expressed in *Davis v. Beason*, 133 U.S. 333, 342 (1890), where it was said that:

"With man's relations to his Maker . . . no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people are not interfered with."

Plaintiff fully agrees with the above and further he believes that his action supports a law of society which will "secure its peace and prosperity and the morals of its people." He believes that contribution of tax money to the purchase of armament is destructive of peace; deprives us of true prosperity, and withal corrupts the people's morals. These all are self-evident, so much so that it would require no argument but for the preconceived errors that go for ideas and for the bias and prejudice fed upon such preconceived errors.

A study of the history of mankind reveals to the plaintiff that the acquisition of armaments has always

resulted in the use thereof and never against destructive forces of nature, but always against other humans. Armament in the hand always was and will be destructive of peace and will not contribute in the future, as it has not in the past, to the securing of peace. Plaintiff, acting on such knowledge, stated that he as a loyal American cannot "contribute to the militarization of my country and through its militarization, to the ruin which has overtaken every democracy which has ever taken this course." (Tr. 9.)

Plaintiff is cognizant of and he gladly accepts the obligations of citizenship (Tr. 9, 11, 13.) He did not take the position of a tax objector lightly, but only after long meditation. He has been a conscientious objector to war since 1939, but only 14 years later was he ready in true conscience to refuse in part his tax payment.

"I have come to the conclusion that I cannot, in conscience, and in love of my country, encourage my country's government to spend my country's substance in the killing of my innocent fellowmen anywhere, or in preparation for killing them, or in preparing my fellow-Americans of military age to kill and to be killed." (Tr. 13.)

Plaintiff believes that Justice Cardozo is not entirely correct when he says in the case of *Hamilton v. Regents* (supra) that the right "of private judgment has never yet been so exalted above the powers and the compulsions of the agencies of government." Plaintiff believes that where "private judgment" derives directly from the command of a Supreme Being,

it is *always* exalted above the powers and compulsions of the agencies of government. One remembers the Prince of Peace, and even such mortals as Giordano Bruno, Thomas Aquinas, the Quakers, and this country's own founding fathers (who appealed their "private judgment" to "the Supreme Judge of the universe"), all of whom believing in the righteousness of their "private judgment" demanded that it be "exalted above the powers and the compulsion of the agencies of government."

Congress recognized the mandate of the First Amendment as to the "free exercise of religion" and therefore when enacting the Military Training and Service Act (Title 50 App. U.S. Code Sec. 453 Selective Service Act of 1948 as amended) exempted from military service those who because of religious training and belief cannot participate in war in any form. It cannot be assumed that Congress would demand of plaintiff, who is beyond draft age, to do military service in the form of purchasing armaments, even though he is opposed to war in any form.

Plaintiff maintains that Congress intended to include him in the exemption to military service, not only because of the Judeo-Christian philosophy underlying the Constitution of this country and its First Amendment, but also because of the specific law of the land incorporating therein the Atlantic Charter (55 Stat. 1600).

On January 1, 1942, twenty-five nations together with the United States subscribed to the Declaration by the United Nations stating, *inter alia*, that:

“Having subscribed to a common purpose and principles embodied in the Joint Declaration of the President of the United States of America and the Prime Minister of the United Kingdom of Great Britain and Northern Ireland dated August 14, 1941, known as the Atlantic Charter . . .”

The signatories of the latter document stated among others that:

“They believe that all nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force . . . no future peace can be maintained if land, sea, or air armaments continue to be employed by nations . . .”

Plaintiff submits that he as a religious objector to war and to preparation therefor in any form, who is beyond draft age, cannot under the Constitution and the laws enacted pursuant thereto be compelled to perform military service in the form of armament purchase exacted from him in the form of taxes. Therefore, the prayer of his complaint should have been granted. The trial court erred in denying the prayer of plaintiff's complaint.

II.

AS A MATTER OF LAW, IS THE EXEMPTION FROM MILITARY SERVICE GIVEN TO CONSCIENTIOUS OBJECTORS OF DRAFT AGE AND THE REFUSAL TO EXEMPT OBJECTORS BEYOND DRAFT AGE FROM THEIR PART IN MILITARY PREPARATION, CLASS LEGISLATION FORBIDDEN BY THE CONSTITUTION OF THE UNITED STATES?

Whether as a grant or as a basic right, Congress in fact exempted from military service all of those of draft age who because of religious training and belief are conscientiously opposed to war in any form.

Title 50, App. U.S. Code sec. 451 et seq. among others, states on that score (Section 456j) that:

“Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regula-

tions as the President may prescribe, to perform . . . such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate . . . ”

For the purpose of plaintiff's pertinent argument the proviso that one who “ . . . is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, . . . to perform . . . such *civilian work* contributing to the maintenance of the national health, safety or interest . . . ” is of crucial importance. The law exacts from a conscientious objector, in “lieu of induction”, “work of national importance.” However this work to be performed is “civilian work,” thus giving full recognition to the objector's religious disability to perform work within the jurisdiction and under the supervision of the military.

It is not denied, but, on the contrary, it is admitted by the Government that plaintiff is a sincere religious objector to war in any form. (Tr. 15, also Exhibit “H”.) Nevertheless, defendants insist that plaintiff perform military service in the form of contributing his tax money to the purchase of armaments, which purchases are made and the moneys are expended exclusively under military direction. Were such interpretation the intent of Congress, there would result a preference given to conscientious objectors of draft age, as against those in the same classification, but above draft age, a discrimination not permitted by the laws of the United States.

The courts have often passed upon laws which appeared to discriminate in favor of one group against another. The courts have permitted such discrimination, *provided* there was a reasonable basis for the classification and discrimination. It is submitted that there is no reasonable basis to discriminate between conscientious objectors of draft age and those beyond it. The reasonable classification encompasses conscientious objectors as against those who can in conscience perform military service. The status denied by the Government for the above-draft-age conscientious objectors as against those of draft age, is unreasonable, and justified neither on legal nor moral grounds. Such unreasonable discrimination would be class legislation forbidden by the laws.

Fourteenth Amendment to the Constitution of the United States;

Board of Education v. Barnette, 319 U.S. 624;
Girourard v. United States, 328 U.S. 61.

One is to assume that a law enacted by Congress is constitutional. Plaintiff assumes that the Military Training and Service Act (Title 50 App. U.S. Code Sec. 451 et seq.) and particularly Sec. 423 pertaining to conscientious objectors is constitutional and that therefore could not have intended, as class legislation, to discriminate against those who, like plaintiff, are, under current Selective Service regulations, beyond draft age.

It is submitted that on the above basis plaintiff's prayer for relief should have been granted and the

trial court was in error in entering its order of March 18, 1957 to the contrary effect. The order ought to be reversed.

III.

AS A MATTER OF LAW, IS THE FORCIBLE COLLECTION OF THAT PART OF THE TAXES THAT ARE SPENT FOR WAR PURPOSES, FROM ONE WHO BECAUSE OF RELIGIOUS BELIEF AND TRAINING IS OPPOSED TO WAR IN ANY FORM, CONTRARY TO THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

In *Cantwell v. Connecticut*, 310 U.S. 296, 303-4, the Supreme Court of the United States in examining the concepts underlying the First Amendment said that it:

“... embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.”

Admitting, *arguendo*, that religious freedom “to act” is or cannot be absolute and that it must be subject to regulation, the question remains: for what purpose? The *Cantwell* case gives the answer “for the protection of society.” Here plaintiff submits that his action, i.e., refusal to pay for the purchase of armaments is the only method by which society can and will be protected. A contrary argument will lead us into a dead-end street, both figuratively and factually.

Let us follow the contrary argument *ad absurdum*. Let us maintain that the manufacture and stockpiling of nuclear weapons is for the “protection of society.”

Now, there is no disagreement that nuclear explosions create radiation debris that endangers all living things and in reaching a certain amount will be lethal to things living. There is no, and cannot be any disagreement that nuclear weapons may be exploded either by design or by accident. There cannot be any disagreement that such explosion, and concomitant pollution of the air, soil, and water with hazardous radiation can occur as long as nuclear weapons are manufactured and stockpiled. *Ergo*, to argue that the paying for the stockpiling of nuclear weapons is "for the protection of society" is putting us on the other side of the Looking Glass in Alice in Wonderland.

Plaintiff, in his refusal to pay that part of his taxes that is used for armaments, placed himself on the realistic side of the Looking Glass, and at the same time under the protection of the *Cantwell* case because his freedom of religious action is for "the protection of society." His freedom of religious action is also in accord with *Davis v. Beason* (supra) since such action is the only action designed to secure to society "its peace and prosperity, and the morals of its people."

While in the foregoing plaintiff did, *arguendo*, agree with the holding of the *Cantwell* case, now he will show that the Supreme Court itself, in subsequent decisions, doubted the correctness of the *Cantwell* holding.

The case of *United States v. MacIntosh*, 283 U.S. 605, 625, was decided in 1931. Here the right to citi-

zenship was denied to Professor MacIntosh, because of his refusal in conscience to take the oath to defend this country with force if necessary. The reasoning adapted in this case as to the First Amendment was similar to the one adapted in the *Cantwell* case nine years later, in 1940, and similar to that in *Davis v. Beason*, adopted 41 years earlier. (See also *United States v. Schwimmer*, 279 U.S. 644; *Jacobson v. Massachusetts* (supra), and *Hamilton v. Regents* (supra).

Beginning with *Board of Education v. Barnette* (supra), continuing with *United States v. Ballard*, 322 U.S. 78, 86 and culminating with *United States v. Girourard*, 328 U.S. 61, the Supreme Court held contrary to the *Cantwell* and other cases above, and interpreted the First Amendment in a manner which, as the plaintiff submits, upholds his position, put into issue here. In the *Girourard* case the court held:

“... the struggle for religious liberty has through the centuries been an effort to accommodate the demand of the State to the conscience of the individual. The victory for freedom of thought recorded in our *Bill of Rights* recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle . . .”
(Emphasis supplied.)

To interpret the First Amendment as does the *Girourard* case upholds the position of plaintiff, and

the contrary holding of the trial court's order of March 18, 1957, must therefore be reversed.

IV.

THE COURTS HAVE HELD THAT CONTRIBUTION TO WAR IN ANY SUBSTANTIAL FORM, PRIOR TO INDUCTION, IS IN CONFLICT WITH THE CLAIM OF CONSCIENTIOUS OBJECTION TO MILITARY SERVICE. AS A MATTER OF LAW, WILL A CONSCIENTIOUS OBJECTOR LOSE HIS STATUS AS SUCH IF HE SO PAYS THAT PART OF HIS TAXES THAT IS SPENT FOR WAR PREPARATION, BECAUSE PAYMENT OF SUCH TAX IS CONTRIBUTION TO WAR IN A SUBSTANTIAL FORM?

Plaintiff's position, that he, as a conscientious objector, may not contribute to war without losing his status as such objector, is upheld by the courts, among them the Supreme Court of the United States. The cases so holding are *Perry Bowen Moore v. United States*, 217 F.2d 428; 348 U.S. 966 and *Witmer v. United States*, 75 S.Ct. 392.

Moore's claim as a conscientious objector was denied even though it was admitted that his religious training and belief clearly brought him within the purview of the Congressional grant of exemption. His church was recognized to be a fundamentalist pacifist church. Its pacifist position brought about antagonism towards it on the part of the community, and this antagonism prevented the church members during the First World War from obtaining a livelihood. To keep alive, some members organized a home industry making ladies' aprons, candy, and, later, garden tractors and implements. The industry employed both church and non-

church members, and among the former the defendant Moore, who was working as a common laborer. During World War II this industrial establishment sold candy to the Armed Forces of the United States. It also sold some ladies' dresses to be used by the female members of the Armed Forces. Under the above circumstances, the United States Court of Appeals for the Seventh Circuit held on December 9, 1954, that Moore's claim for exemption as a conscientious objector may be properly denied by Selective Service on the ground that

“His church on whose tenets his claim of exemption rests, though devoted to pacifist doctrines, *contributed to the war efforts of this country by manufacturing supplies and equipment for the Armed Forces.*” (Emphasis ours.)

The inference from the above decision is plain, and that is, that a conscientious objector to war must not, on penalty of forfeiting his previous status as a conscientious objector, contribute to war by paying that part of his taxes that is used for the purchase of military equipment or the payment of military personnel.

This inference becomes still plainer when we read the Government's contention as presented in its brief before the Supreme Court of the United States (521 October Term 1954, 348 U.S. 966). The contention was that Moore was justly denied classification as a conscientious objector because

“His religious community had no compunction against acting as a war contractor for the Government during World War II, and apparently was

content to profit from the war situation as a direct supplier to the war effort. Such willingness to cooperate toward the prosecution of the war is entirely inconsistent with conscientious objection to a non-combatant participation in war in any form."

In the instant case plaintiff's contribution of his tax money to buy military equipment is just as inconsistent with his claim as conscientious objector as was Moore's working as a common laborer in a factory making candy and ladies' dresses, some of which were sold to the Army. We submit that contribution of tax money to war is more direct since it is made by the individual himself, while a common laborer, as Moore was, has no say-so about the factory's supplying its customers. (The *Moore* case was reversed by the Supreme Court on other grounds than the ones here discussed, and, therefore, the decision of the United States Court of Appeals for the Seventh Circuit as to the reasoning hereinabove set forth stands unreversed.)

Like plaintiff's sincerity in the instant case, so was the sincerity of Moore recognized by the Government, nevertheless the Government contended against his being granted exemption as a conscientious objector. About Moore and his church, the Government's brief before the Supreme Court of the United States stated thus:

"He and his church were opposed to force. He and his colleagues never struck a blow in anger or in self-defense. They held no malice for harm

done to them by others. When their congregation was fired upon during a religious meeting, none of the members appeared to testify against the would-be murderers. They submit quietly and without reprisal to indignities, insults and even assaults."

Nevertheless, said the Government, Moore, who was a common laborer in a factory which supplied candy and ladies' garments on contract to the Armed Forces of the United States

"was engaged in supplying materiel under Government contract for shipment to the Armed Services. *His position was no less proximate to the fighting than any stateside troops of the Supply Services.*" (Emphasis supplied.)

And, said the Government, Moore "at no time has repudiated the stand taken by his church in the manufacture of war supplies" and therefore he was not entitled to the classification of a conscientious objector.

The above contention of the Government in the *Moore* case and the holding of the United States Court of Appeals for the Seventh Circuit (217 F. 2d 428) force the conclusion that a conscientious objector must refuse to make any contribution to war and must also repudiate any willingness to do so. He must refuse to pay monies which are used for war. If he fails to do so, he forfeits his right subsequently to claim exemption from military service.

That such a contention may, and likely will be, upheld by the Supreme Court of the United States can

be seen from the case of *Witmer v. United States*, 75 S. Ct. 392. In that case Witmer refused to be inducted after his claim for exemption as a conscientious objector was denied by his Local Selective Service Board, as well as by the Appeal Board. The District Court found him guilty of refusing to obey the order of induction, and such conviction was upheld by the Supreme Court because that court doubted his sincerity as a conscientious objector, saying:

“Although he asserted his conscientious objector belief in his first exemption claimed, in the same set of papers he promised to increase his farm production and ‘contribute a satisfactory amount for the war effort’. Subsequently, he announced ‘the boy who makes the snowball is just as responsible as the boys who throw them.’ ”

The Supreme Court, while not declaring whether it agreed with the first or second of Witmer’s quoted statements above, concluded that “these inconsistent statements in themselves cast considerable doubts on the sincerity of petitioner’s claim” of being a conscientious objector.

In the instant case, plaintiff says with Witmer that “the boy who makes the snowball is just as responsible as the boys who throw them”. At the same time, however, he maintains a consistent position and declares that he is unable to contribute that part of his taxes which is used for war. By doing so, he hopes to escape the onus that would be placed upon him by the *Witmer* decision which is so obviously applicable here.

The decisions in the *Moore* and *Witmer* cases take the contention raised by the complaint out of the sphere of speculation and therefore the prayer of his complaint should have been granted. The trial court erred in granting defendants' motion to dismiss, and therefore this Court ought to reverse the order of March 18, 1957.

V.

THE DRAFT AGE IS SUBJECT TO CONGRESSIONAL CHANGE, AND THEREFORE, ONE WHO IS BEYOND DRAFT AGE MAY BECOME SUBSEQUENTLY SUBJECT TO DRAFT. AS A MATTER OF LAW, WILL A CONSCIENTIOUS OBJECTOR BEYOND DRAFT AGE WHO, PRIOR TO BEING CONSCRIPTED, PAYS THAT PART OF HIS TAXES THAT IS SPENT FOR WAR PURPOSES, BECOME SUBJECT TO MILITARY SERVICE, IF THE DRAFT AGE IS RAISED, BECAUSE HIS CONTRIBUTION TO WAR IN THE FORM OF HIS TAX PAYMENT DEPRIVED HIM OF HIS CLAIM TO BE RECOGNIZED AS A CONSCIENTIOUS OBJECTOR TO WAR?

While it is true that at the present time, plaintiff is beyond the age limit for draftees, it cannot be gainsaid that Congress has the power to raise the age limit so that plaintiff will be made available for military service. By contributing to war by paying the war budgeted part of his taxes, he forfeits his status as a conscientious objector and in case of change of the age limit he will be compelled to do military service, in spite of his religious objection and in spite of the law granting exemption to other objectors. Such a contingency is not speculative; it is, in fact, less so than were the circumstances in the case of *In re Clyde Wilson Summers*, 325 U.S. 561.

In that case Summers graduated from the Law School of the University of Illinois with high honors. As a religious objector to war he claimed and obtained from his Local Draft Board a classification as a conscientious objector, and during World War II he did go to a Civilian Public Service Camp, there, in lieu of induction into military service, to do work of national importance. After the war he passed the Illinois Bar Examination. However, his admission to practice before the courts of that state was denied on the recommendation of the Committee on Character and Fitness which held that Summers, being a pacifist, was not morally fit to practice law.

Summers petitioned the Supreme Court of Illinois asking that he be admitted to the Bar notwithstanding the unfavorable report of the Committee on Character and Fitness. The Supreme Court sustained the Committee and excluded Summers from the practice of law in that state.

On a writ of certiorari to the Supreme Court of the State of Illinois, the Supreme Court of the United States reviewed the proceedings holding that there was a case or controversy involved. The Supreme Court, by a four to four decision (Justices Black, Douglas, Murphy and Rutledge dissenting, and Justice Jackson not participating), upheld the Supreme Court of Illinois in excluding Summers from the practice of law because of his conscientious objection to war.

The Supreme Court of the United States, speaking through Justice Reed, found that

“The sincerity of petitioner’s beliefs are not questioned. He has been classified as a conscientious objector under the Selective Training and Service Act of 1940, 54 Stat. 885, as amended. Without detailing petitioner’s testimony before the Committee or his subsequent statements in the record, his position may be compendiously stated as one of non-violence. Petitioner will not serve in the armed forces. While he recognizes a difference between the military and police forces, he would not act in the latter to coerce threatened violations. Petitioner would not use force to meet aggression against himself or his family, no matter how aggravated or whether or not carrying a danger of bodily harm to himself or others. He is a believer in passive resistance. We need to consider only his attitude toward service in the armed forces.”

Nevertheless, Summers was forbidden to practice his profession because

“Illinois has constitutional provisions which require service in the militia in time of war of men of petitioner’s age group. The return of the Justices² alleges that petitioner has not made any showing that he would serve notwithstanding his conscientious objections. This allegation is undenied in the record and unchallenged by brief. We accept the allegation as to unwillingness to serve in the militia as established. While under Section 5(g) of the Selective Training and Serv-

²Summers asked for and the Supreme Court of the United States issued a Rule to show cause to the Chief Justice and Associate Justices of the Supreme Court of Illinois, why Summers ought not to be licensed to practice law in the State of Illinois.

ice Act, *supra*, conscientious objectors to participation in war in any form now are permitted to do non-war work of national importance, this is by grace of Congressional recognition of their beliefs. *Hamilton v. Regents*, 293 U.S. 245, 261-65, and cases cited. The Act may be repealed. No similar exemption during war exists under Illinois law. The Hamilton decision was made in 1934, in time of peace. This decision as to the powers of the state government over military training is applicable to the power of Illinois to require military service from her citizens."

The service requirements mentioned pertain to the constitution of Illinois of 1870, Art. XII, Sec. 1 as amended. This section provides for a state militia consisting of

"... all able bodied male persons resident in the state, between the ages of 18 and 45, except such persons as now are, or hereafter may be, exempted by the laws of the United States, or of this state."

How farfetched, not to say speculative, the reasons were on the basis of which Summers was excluded from the practice of law may be seen from the dissent of Justice Black who asked:

"Whether a state which requires a license as a prerequisite to practice law can deny an applicant a license solely because of his deeply rooted religious convictions. The fact that petitioner measures up to every other requirement for admission to the Bar set by the state demonstrates beyond doubt that the only reasons for his rejection was his religious beliefs."

Justice Black supports the above statement by the fact that the State of Illinois does not deny that Summers possesses the following qualifications:

“He is honest, moral, and intelligent, has had a college and a law school education. He has been a law professor and fully measures up to the high standards of legal knowledge Illinois has set as a prerequisite to admission to practice law in that State. He has never been convicted for, or charged with, a violation of law. That he would serve his clients faithfully and efficiently if admitted to practice is not denied. His ideas of what a lawyer should be indicate that his activities would not reflect discredit upon the bar, that he would strive to make the legal system a more effective instrument of justice. Because he thinks that ‘Lawsuits do not bring love and brotherliness—just create antagonisms,’ he would, as a lawyer, exert himself to adjust controversies out of court, but would vigorously press his client’s cause in court if efforts to adjust failed. Explaining to his examiners some of the reasons why he wanted to be a lawyer, he told them: ‘I think there is a lot of work to be done in the law . . . I think the law has a place to see to it that every man has a chance to eat and a chance to live equally. I think the law has a place where people can go and get justice done for themselves without paying too much, for the bulk of people that are too poor.’ No one contends that such a vision of the law in action is either illegal or reprehensible. The petitioner’s disqualifying religious beliefs stem chiefly from a study of the New Testament and a literal acceptance of the teachings of Christ as he understands them. Those beliefs are these:

“He is opposed to the use of force for either offensive or defensive purposes. The taking of human life under any circumstances he believes to be against the Law of God and contrary to the best interests of man. He would if he could, he told his examiners, obey to the letter these precepts of Christ: ‘Love your Enemies; Do good to those that hate you; Even though your enemy strike you on your right cheek, turn to him your left cheek also.’ The record of his evidence before us bears convincing marks of the deep sincerity of his convictions, and counsel for Illinois with commendable candor does not question the genuineness of his professions.”

Justice Black points out speculatively that under the test applied to Summers none of the Quakers who “have had a long and honorable part in the growth of our nation . . . could qualify for the Bar in Illinois,” and further says Justice Black:

“The conclusion seems to me inescapable that if Illinois can bar this petitioner from the practice of law it can bar every person from every public occupation solely because he believes in non-resistance rather than in force. For a lawyer is no more subject to call for military duty than a plumber, a highway worker, a Secretary of State, or a prison chaplain.”

“It may be, as many people think, that Christ’s Gospel of love and submission is not suited to a world in which men still fight and kill one another. But I am not ready to say that a mere profession or belief in that Gospel is a sufficient reason to keep otherwise well qualified men out of the legal profession, or to drive law-abiding law-

yers of that belief out of the profession, which would be the next logical development.”

We submit that in the instant case plaintiff’s claim as to the possible contingency, i.e., Congress’ raising the draft age, is less speculative than was the possibility of Summers’ being called to serve in the militia, because, as Justice Black said,

“The state’s denial of petitioner’s application to practice law resolves itself into a holding that it is lawfully required that all lawyers take an oath to support the state constitution and that petitioner’s religious convictions against the use of force make it impossible for him to observe that oath. The petitioner denies this and is willing to take the oath. The particular constitutional provision involved authorizes the legislature to draft Illinois citizens from 18 to 45 years of age for militia service. It can be assumed that the State of Illinois has the constitutional power to draft conscientious objectors for war duty and to punish them for a refusal to serve as soldiers—powers which this Court held the United States possesses in *United States v. Schwimmer*, 279 U.S. 644, and *United States v. McIntosh*, 283 U.S. 605. But that is not to say that Illinois could constitutionally use the test oath it did in this case.”

and further

“The Illinois Constitution itself prohibits the draft of conscientious objectors except in time of war and also excepts from militia duty persons who are ‘exempted by the laws of the United States.’ It has not drafted men into the militia since 1864, and if it ever should again, no one can say that it will not, as has the Congress of

the United States, exempt men who honestly entertain the views that this petitioner does. Thus the probability that Illinois would ever call the petitioner to serve in a way has little more reality than an imaginary quantity in mathematics.”

The speculative ground for Summers’ exclusion from the profession of law was one that had not existed since 1864; nevertheless, the Supreme Court, in upholding Summers’ exclusion from the Bar of Illinois, assumed speculatively that such contingency may occur. Congress before, during, and after World War II, changed the draft age a number of times, and it may do so again to the extent that plaintiff here will be reached notwithstanding that he, at the present, is beyond the existing draft age. His reasons are no more but rather less speculative than the ones upheld in the Supreme Court of the United States in the *Summers* case; and, therefore, we respectfully submit that the circumstances here prevailing demand the reversal of the order of March 18, 1957.

VI.

AS A MATTER OF LAW, IS A CONSCIENTIOUS OBJECTOR TO WAR IN ANY FORM, WHO IS BEYOND DRAFT AGE, ENTITLED TO A DECLARATION OF HIS RIGHTS WITH REFERENCE TO HIS REFUSAL TO PAY THAT PART OF HIS TAXES THAT ARE SPENT FOR WAR PURPOSES?

Plaintiff believes that the answer is Yes. 28 U.S.C. par. 2201 (1952) grants any court of the United States the power to declare the rights and other legal relations of any interested party seeking such declaration.

That is true even with respect to Federal taxes when there are extraordinary or exceptional circumstances present.

In the case of *Hudson v. Crenshaw*, 130 F. Supp. 166, it is stated that courts should not interfere in the absence of extraordinary or exceptional circumstances with the collection of taxes when there is administrative remedy available to the taxpayer.

The complaint here clearly indicates that plaintiff attempted over a period of years to obtain administrative remedy without avail. The complaint also clearly sets forth that the circumstances surrounding the plaintiff are extraordinary and exceptional. They are such because his religious training and belief prevent him from participating, in conscience, in war in any form. His sincerity is unquestioned, as it is shown by the complaint; it is unquestioned that Congress granted exemption from military service to conscientious objectors. (U.S.C. Title 50, App. Sec. 451-470; particularly Section 6(j).)

We have shown that, in the *Moore* and *Witmer* cases, the courts of the United States uphold the right to exemption from military service only of those who maintain a consistent pacifist position at all times, and, therefore, plaintiff is bound by such court holdings to declare himself at all times to be a conscientious objector, and to comport himself accordingly at all times, on pain of forfeiting his claim to the status thereafter. Because of the extraordinary and exceptional circumstances thus prevailing in the instant case, the plaintiff is entitled to the declaration of his legal

rights *vis-à-vis* the use of his tax money for war purposes.

As we shall show in the next Section VII of this brief pertaining to injunctive remedy, the courts have jurisdiction in the instant case to issue an injunction as prayed for by plaintiff. It was said in the case of *Excelsior Life Insurance Company v. Thomas*, 49 F. Supp. 90 (1943), the court which has authority to restrain issuance of a distraint warrant by a collector of taxes must have power to declare the rights of the parties in connection with the property.

VII.

AS A MATTER OF LAW, IS A CONSCIENTIOUS OBJECTOR TO WAR IN ANY FORM, WHO REFUSES TO PAY THAT PART OF HIS TAXES THAT IS SPENT FOR WAR PURPOSES, ENTITLED TO A RESTRAINING ORDER AGAINST FORCIBLE ATTEMPT TO COLLECT SUCH TAX?

Internal Revenue Code 1954 (26 U.S.C.A. Sec. 7421) prohibits suits under *normal circumstances* to restrain assessment or collection. To understand the implications of Section 7421 of the Internal Revenue Code of 1954 (and the similar provisions contained in Section 3653 of the Internal Revenue Code of 1939), it is well worthwhile to refer to the historical note as it is set forth in *Calwalader v. Sturgess*, 297 F. 73, wherein it is said

“It is necessary to the maintenance of the Government that the collection of taxes imposed for this purpose shall not be hindered or delayed, either by those who are charged with their payments, or by the courts in their behalf. Therefore,

the law requires, broadly, that all taxes, even those 'erroneously or illegally assessed', shall be paid when due. The Congress knew, of course, that injustice would occasionally be done by the enforcement of this necessary rule. Therefore, it prescribed a method by which one who has paid a tax 'erroneously or illegally assessed or collected' may recover it. This method contemplates, first, payment of the tax. It then provides for an application to be addressed to the Commissioner of Internal Revenue for refund of the tax. If the application be granted, his grievance has been satisfied; if it be rejected, *he may bring suit against the collector in a court of law to recover the amount of the tax and there succeed or fail according to the merits of the case.*" (Emphasis supplied.)

With reference to the above section the court stated in *Holland v. Nix*, 214 F. 2d 317 (1954) that "*This section is general in its terms and should not be construed as abrogating the equitable principles which permit actions to restrain collection where the exaction is illegal or there exist special and extraordinary circumstances sufficient to bring case within some acknowledged head of equity jurisdiction.*" (Emphasis supplied.)

As we set forth the facts in our complaint, the circumstances are special and extraordinary, and because of those circumstances there is sufficient reason to bring the case within the equity jurisdiction of the court. The circumstances surrounding plaintiff's case are extraordinary, not because of unconstitutionality of the Statute (which the plaintiff did not

claim), nor because of illegality of the collection (the plaintiff expressed willingness to pay his taxes in full provided that can be done in full recognition of his conscientious objection to war). The circumstances are special and extraordinary because Congress while recognizing the right of conscientious objectors to be exempted from military service, failed to make similar provision respecting the status of those conscientious objectors who are not of draft age. The circumstances are special because, as we set forth in Section IV of this brief, the courts have forewarned conscientious objectors to be and remain consistent in their attitude towards participation in war and preparation therefor, and when plaintiff so declared his attitude he was informed by the administrative agency that there are no remedies available to him. The courts also declared repeatedly and without any question of doubt that Congress has the right to extend the draft age at any time, so as to make plaintiff available for military service unless his claim as a conscientious objector is upheld.

See also *Miller v. Nut Manufacturing Co.*, 284 U.S. 498, 52 S.Ct. 260, 76 L. Ed. 422, which holds that collection of taxes may be enjoined under special and extraordinary circumstances which bring the case within equity jurisdiction. Here the plaintiff's case presents not only an extraordinary circumstance for equity to interfere but one where the most extreme urgency is present, due to the threatened penalty. The penalty is the loss of the status of conscientious objector as we have shown in Sections IV and V of this brief.

Because equity demands that the courts extend protection to plaintiff against his being penalized, and when no remedy at law is available, and the trial court in dismissing the cause erred, therefore the order of dismissal ought to be reversed.

THE QUESTION OF NECESSARY PARTIES.

We believe that with the foregoing, while presenting plaintiff's positive claims, we also answered defendants' first three points in their "Notice of Motion to Dismiss". (Tr. 46, 47.) There is a fourth point raised by defendants, i.e., that "plaintiff has failed to join indispensable parties". (Tr. 47.)

Defendants' Motion does not tell what "parties" are indispensable to the maintenance of the suit. Therefore we shall argue this point in general terms.

In the case of *Bernstein, et al., etc., v. Herren*, 136 F. Supp. 493, the plaintiffs who were inductees in the Army of the United States sued the Commanding General of the training camp and asked that the court issue an injunction against the General, restraining him from discharging the plaintiffs otherwise than with an "honorable discharge." The Government moved that the cause be dismissed, because the Secretary of the Army was not joined and he is an indispensable party. The court denied the motion to dismiss and stated:

"... it is argued that the failure to join the Secretary of the Army, at whose instance final action would be taken under AR 604-10, is a

failure to join an indispensable party, an incurable defect because the Secretary's residence is in the District of Columbia. Under *Williams v. Fanning*, 332 U.S. 490, and *Shaughnessy v. Pedreiro*, 349 U.S. 48, that contention is without merit. The distinction is urged that an injunction against the defendant would call for an affirmative act which he is powerless to perform. As already indicated, it is not at this time clear that he lacks the necessary power. It is furthermore not clear at this time that a mandatory act on the part of the defendant would be required, on the ground that a restraint upon the defendant may well operate on his subordinates as his agents. In any event, this court has the power, in the appropriate circumstances, to issue a mandatory injunction, *Trautwein v. Moreno Mut. Irr. Co.*, (9 Cir.) 22 F. 2d 374, and there is no present basis for holding that such a process would be ineffective against the officer now before the court. Cf. *Levin v. Gillespie*, 121 F. Supp. 726."

See also:

Work v. United States ex rel. Rives, 276 U.S. 175;

Williams v. Fanning, 332 U.S. 490;

Levin v. Gillespie, 121 F.Supp. 726.

CONCLUSION.

The issues presented by this appeal are extremely simple. It is submitted that the legal problems involved, if viewed from the basic philosophy underlying the American Constitution, are similarly simple.

The intent of those who formulated the First Amendment to the Constitution was not ambiguous. Those who insisted that the First Amendment be formulated, and be made part of the Constitution, intended that certain freedoms such as those of speech, religion, press, assembly, be placed "beyond the reach of legislative limitation." The framers of the Constitution wrote that document with full awareness that it and the freedoms guaranteed by the Bill of Rights are "the basic postulates of a society which is governed by the votes of its citizens."

Plaintiff as a religious objector to war and to preparation therefor cannot participate in, nor can he contribute to, war in any form. Payment of taxes with which to buy military armaments is contributing to war in a substantial manner. Plaintiff ought not and under the Constitution cannot be compelled to do so.

The order of the trial court of March 18, 1957, is contrary to the Constitutional concept hereinbefore presented and therefore it was entered in error. For the reasons argued by plaintiff, the order of March 18, 1957, ought to be reversed by this Honorable Court.

Dated, Carmel, California,
September 10, 1957.

Respectfully submitted,

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No. 15,594

IN THE

United States Court of Appeals
For the Ninth Circuit

MILTON MAYER,

Appellant,

vs.

ERNEST WRIGHT, Regional Commissioner
of Internal Revenue Service and HAR-
OLD HAWKINS, District Director, Inter-
nal Revenue Service,

Appellees.

Appeal from the United States District Court for
the Northern District of California,
Southern Division.

Honorable Louis E. Goodman, Trial Judge.

APPELLANT'S REPLY BRIEF.

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Subject Index

	Page
I. Plaintiff's position	3
II. Plaintiff's conscientious objection to war existed in the past and does exist now	5
III. The forcible collection of plaintiff's taxes for war purposes is not speculative and is immediate	7
IV. Plaintiff's position as to payment of taxes for war purposes is distinguishable from the objection of others on the ground of free exercise of religion	8
V. Plaintiff's position as to war taxes is that of the Quakers	9
VI. Under the allegations of the complaint a request for refund of the taxes is useless and, therefore, not required	12
Conclusion	14

Table of Authorities Cited

Cases	Pages
Allen v. Regents, 304 U.S. 430	12
Carmack v. Scofield, 201 F. 2d 360	14
Cincinnati Soap Co. v. United States, 301 U.S. 308	6
Halvering v. Davis, 301 U.S. 619	6
Hanna Iron Ore v. United States, 68 F. Supp. 832	14
Moore, Perry Bowen v. United States, 217 F. 2d 428; 348 U. S. 966	8
Mormon Church v. United States, 136 U.S. 1	9
Murphy v. United States, 78 F. Supp. 236	14
Reeves v. Wise, 119 F. 2d 472, cert. den. 62 S.Ct. 181	14
Sirian Lamp Co. v. Manning, 123 F. 2d 776, 138 ALR 1423	13
Witmer v. United States, 75 S. Ct. 392	8

Constitutions, Statutes and Other Authorities

First Amendment to the Constitution of the United States..	2, 4, 9
Internal Revenue Code, Section 3772	13, 14
50 App. U.S.C., Sec. 451 et seq.	9
Advises on Conscription and War	10
Faltenmayer, Edmund K., The Wall Street Journal, Vol. 56, No. 29, Feb. 11, 1957	7
Fox, George . . . Declaration to Charles II	11
Meeting of the Friends 1779	11
Peace Testimony of the Society of Friends	10

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Honorable Louis E. Goodman, Trial Judge.

APPELLANT'S REPLY BRIEF.

Plaintiff's argument reduced to its simplest terms is set forth on pages 17 and 18 of his Opening Brief thus: he, because of religious training and belief, is conscientiously opposed to war or to military preparation for war. He accepts the Sixth Commandment as an unconditional and unchangeable commandment against killing. He would not kill another human being himself, and would not put the instruments of

killing into the hands of others who would or could do the killing for him vicariously. He cannot pay for instruments of destruction and killing because doing so would be contrary to his religious belief which is protected by the First Amendment.

The Government's argument similarly reduced to its simplest terms is this:

(1) Plaintiff disapproves of the use to which the Government makes of part of the tax monies it receives from its citizens and because of such disapproval he ought not to be compelled to pay the taxes disapproved of by him. (App. Brief, page 7.)

(2) He asks relief from the payment of such part of his taxes which are expended for war purposes, even though he does not show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the tax collection. (App. Brief, page 9.)

(3) Plaintiff's showing as to the injury to him is far too speculative and remote for the courts to afford him relief from the contested tax payment. (App. Brief, page 15.)

(4) That if this plaintiff can contest the use of his taxes, then everyone may do so. (App. Brief, pages 22, 26, 27 and 29.)

(5) That plaintiff's objection to the use of part of his income tax for war preparation is an individual view not supported by any religious organization.

(6) That plaintiff failed to demand refund for his taxes and thus his complaint fails to show a cause of action.

None of these arguments of the Government withstands examination.

I.

THE POSITION OF PLAINTIFF AS TO THE PAYMENT OF TAXES.

The Government, on page 7, wrongly states that the gist of plaintiff's position is "that he disapproves of the use to which the Government makes of part of the tax monies it receives from its citizens, and, accordingly, he should not be compelled to pay that portion of his taxes which is utilized for purposes of which he disapproves." Using the word "disapproves" in the above sentence twice, the Government attempts to reduce plaintiff's conscientious position to a personal and even to a quixotic one. Plaintiff's Opening Brief, setting forth his position arrived at after long soul-searching, makes it clear that the Government did not set forth the gist of his position, rather deliberately misconstrued it.

As it is set forth in the Appellant's Brief (pages 15 to 18) he is a religious objector to war and to any form of preparation for it, and his objection is of long standing. His public statements as to his Pacifist position is accepted as that of the Quakers on whose behalf he was lecturing on the subject of Pacifism. While still of draft age, plaintiff informed his draft board that because of his religious training and belief emanating from his belief in the Supreme Being, he was opposed to participation in the war in any form

and that, therefore, he could not perform military service, either as a combatant or as a non-combatant.

After reaching the age that exempted him from draft, and after long meditation, he concluded that contributing to the purchase of armaments by paying those parts of his taxes that are used for such purposes is contrary to his conscientious objection to war and preparation therefor, and he informed the tax collector. Plaintiff claimed in his correspondence with the Treasury Department that since Congress in deference to the First Amendment granted exemption to conscientious objectors from military service who were of draft age, that he ought to be given a similar exemption by not being compelled to contribute to the war preparation in the form of tax payment. Plaintiff is not objecting to the payment of taxes; in fact, he asked the Government that he might be allowed to pay the full amount of his taxes for non-military purposes, because he was unable as a sincere religious objector to war to pay taxes for purposes of war preparation.

Looking upon the situation in this manner, the plaintiff's position is seen to be neither personal nor quixotic as the Government's brief attempted to make it.

II.

PLAINTIFF'S RELIGIOUS OBJECTION TO WAR WAS MAINTAINED IN THE PAST AND IT IS MAINTAINED AT THE PRESENT.

On page 9 of the Government's Brief, it argues that plaintiff cannot obtain any relief on the payment of those parts of his taxes that are used for war purposes because he sustains no direct injury as the result of the tax collection, and that if he suffers injury that it is indefinite or is in common with people generally.

Our Opening Brief makes it clear that the Government again misconstrued plaintiff's position, because one thing stands out in bold relief and that is, that plaintiff is a conscientious objector *now*. Plaintiff is conscientiously unable to participate in war either by means of direct participation in the killing entailed by all wars, or by contributing his earthly goods to purchase implements of warfare. The forcible collection of those parts of his taxes that are used for war preparation are injuring him as a conscientious objector *now*. The compulsion *now* placed upon him is interfering with the free exercise of his religion *now*.

Plaintiff's injury is not in common with people generally. Those who are not opposing war because of religious training and belief have not, and cannot have, any objection to the purchase of armaments to be used for war purposes of which they approve.

As the Appellant's Brief shows (page 6), the plaintiff offered the payment of his taxes in full and asked that one-half ($\frac{1}{2}$) thereof now budgeted and expended for war purposes "be placed in the general funds of

the Treasury of the United States to be expended solely for peaceful and constructive purposes." The Government then goes on to argue (pages 9 and 10) against this proposition, indicating, though not stating, that such earmarking of plaintiff's taxes would be contrary to the law or the Constitution. The Government is in error on that score, because it was held that the appropriation of the proceeds of a tax to a specific use does not affect the validity of the exaction, if the general welfare is advanced and no other Constitutional provision is violated. So it was held in the *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937), wherein a processing tax on cocoanut oil was sustained despite the fact that the tax collected upon oil of Philippine production was segregated and paid into the Philippine Treasury.

Similarly, the court upheld the excise tax on employers which tax was intended to provide funds for payments to retired workers. *Halvering v. Davis*, 301 U.S. 619 (1937). The court in the above cases upheld the use of taxes for specific purposes under the general welfare clause of the Constitution. The same clause is eminently applicable to plaintiff's request for relief when he asked that part of his taxes which otherwise would be expended for destructive purposes "be expended solely for peaceful and constructive purposes."

The earmarking of taxes is a procedure resorted to from time to time as it is contemplated in connection with the financing of the expanded expenditures of the Civil Aeronautics Administration. The Executive

Department of the United States undertaking a high priority study as to the method of taxation for the purposes of the C.A.A. "One financing device under consideration is a special trust fund, separate from the Federal budget, like the one set up for Federal highway construction last year. That way airlines and others would have a guarantee their tax payments were going directly into traffic control gear and not, say, into slum clearance."¹

The plaintiff, in the instant case, suggests that those parts of his taxes which would otherwise be spent for armament purposes be set aside and used, let us say, for existing Federal programs of public health or slum clearance purposes, which purpose under the various decisions is to be considered to be covered by "the general welfare" clause of the Constitution.

III.

THE USE OF PLAINTIFF'S TAX MONEY FOR THE PURCHASE OF IMPLEMENTS OF WAR IS A POSITIVE INJURY TO HIM AT THE PRESENT BECAUSE IT INFRINGES UPON THE FREE EXERCISE OF HIS RELIGION.

Appellant's Brief, page 15, maintains that plaintiff's claim based on some future raise of the draft age which would subject him to the draft into the Armed Forces is far too speculative and remote. That is, we submit, not well taken. Our Opening Brief, pages 36 to 43, answered the Government's contention.

¹Edmund K. Faltenmayer in the Wall Street Journal, Vol. 56, No. 29, February 11, 1957.

We want to add just one point which will indicate the error of the Government's contention.

It cannot be gainsaid that Congress has the power to raise the draft age. Plaintiff is not so ancient, nor is the peace situation of the world so stable that war is totally excluded in his lifetime. If war should break out, it is expected to be of extreme ferocity requiring substantially all able-bodied men and possibly women to serve in the Armed Forces. It is then to be expected that the draft age will be raised to include the plaintiff. If that comes to pass his present contribution of his taxes for the purchase of implements of war will, at best, cast doubt upon his sincerity as a conscientious objector, or, at worst, will justify the draft boards in denying him the classification of a religious objector. See *Perry Bowen Moore v. United States*, 217 F. 2d 428, 348 U.S. 966, and *Witmer v. United States*, 75 Sup. Ct. 392.

IV.

**THE GOVERNMENT'S ARGUMENT, PAGES 22, 26, 27 AND 29,
THAT IF ONE TAXPAYER MAY CONTEST THE USE OF
HIS TAXES, SO CAN ANOTHER ONE, FAILS TO CON-
SIDER CERTAIN CRUCIAL DISTINCTIONS.**

One distinction is that plaintiff stands foursquare on the First Amendment which grants to him, without any negative power on the part of Congress, the free exercise of his religion. A further distinction is that plaintiff is admittedly a Pacifist who, because of his

religious training and belief, is conscientiously opposed to participate in war or in preparation therefor in any form, and thirdly, that Congress, undoubtedly in deference to the First Amendment, legislated that conscientious objectors, if proven to be such, are not to be compelled to participate in war in any form.

This last distinction should suffice as an answer as to why the practice of polygamy was never considered by our courts as falling within the free exercise of religion. Polygamy was never given by Congress the status as that given to conscientious objectors and, in consequence, the Government's argument based on the case of *Mormon Church v. United States*, 136 U.S. 1, is without any binding effect on the issues here.

V.

PLAINTIFF'S OBJECTION TO THE USE OF PART OF HIS INCOME TAXES FOR WAR PREPARATION IS IN LINE WITH THE RELIGIOUS VIEWS OF THE QUAKERS. FURTHERMORE, THE QUESTION OF CONSCIENCE IS THAT OF THE INDIVIDUAL AND NOT OF ANY GROUP.

The Government in its footnote 4 on page 25, questions whether plaintiff's objection to the use of part of his taxes for war purposes represents an individual view or the belief of a religious body. It is wholly immaterial to the issues here. Congress in granting the right to conscientious objectors to be exempted from military service speaks of the **individual conscience**. Title 50, App. U.S. Code 451, *et seq.* (Section

456j) speaks of a "**person**" who "by reason of religious training and belief is conscientiously opposed to participation to war in any form." In defining religious training and belief, the Act says that it "means an **individual's belief** in a relation to a Supreme Being involving duties superior to those arising from any human relationship . . ." The Statute further states that the application is to the individual because "any **person** claiming exemption . . ." (Emphasis added.)

The Government's argument on this score is wholly in error because the Religious Society of Friends (Quakers) subscribes to the position herein taken by plaintiff who is a participant in the activities of the Friends Meetings, and leading Quakers of the country recognize plaintiff's lectures, articles, etc. as expressing the Quaker's Pacifist position (Tr. 6, Opening Brief, pages 3 and 4). Let us see what the Quakers profess with reference to the issues here involved. A Meeting representing Friends in the United States held at Earlham College, Richmond, Indiana, July 20 to 22, 1948, issued a statement entitled "Advices on Conscription and War." Therein it is stated "a living concern having been expressed that Friends' practices be consistent with their professions, Friends are urged . . . to consider carefully the implication of paying those taxes, a major portion of which goes for military purposes." The "Peace Testimony of the Society of Friends" issued by the American Friends Service Committee records that in 1755 a considerable number of Friends refused to pay a tax levied in

Pennsylvania largely for the purpose of waging the Indian Wars.

The Revolutionary War of this country confronted the Quakers with momentous problems when they were called upon to choose between their secular duty to pay taxes for war purposes and their duty imposed upon them by their religious conviction. Job Scott describes the Friends' position taken in 1779 as follows: "At our early Meeting this year, 1779, the subject of Friends paying taxes for war came under solid consideration. Friends were unanimous that the testimony of truth and of our Society was clearly against our paying such taxes as were wholly for war and many solid Friends manifested a lively testimony against the payment of those in the mixture; which testimony appeared evidently to me to be on substantial ground, arising and spreading in the authority of truth."

It was almost 300 years ago when the Quakers under the leadership of George Fox presented their Declaration to Charles II, which Declaration is still adhered to by the Quakers at this time: "We utterly deny all outward wars and strife, and fightings with outward weapons, for any end, or under any pretence whatever; this is our testimony to the whole world. The Spirit of Christ by which we are guided, is not changeable, so as once to command us from a thing as evil, and again to move us unto it; and we certainly know, and testify to the world, that the Spirit of Christ, which leads us unto all truth, will never move us to fight and war against any man with outward

weapons, neither for the Kingdom of Christ, or for the kingdoms of this world . . . Therefore we cannot learn war any more."

VI.

UNDER THE ALLEGATIONS OF THE COMPLAINT, THE REFUND FOR TAXES WAS USELESS AND, THEREFORE, IT WAS NOT REQUIRED TO BE MADE.

From January 1953 until August 15, 1954, plaintiff wrote numerous letters to the Treasury Department setting forth his position as to his inability as a conscientious objector to pay those parts of his taxes which are used for war purposes. (Tr. 8, 9, 10, 11, 12, 13, 14, and 15.) (Exhibits E, F, G, and H.)

He expended a great deal of time in his efforts to obtain relief from the Administrative Agency, but he was not successful, because the Treasury Department answered him on September 2, 1954 that while it ". . . appreciates the sincerity of your views in this matter, the Federal Income Laws . . . apply uniformly to every individual . . ." (Tr. 15.) From the record it is apparent that the road to a refund was barred to him, and under the decision of *Allen v. Regents*, 304 U.S. 430, the circumstances are such that no refund request was to be made since it would have represented nothing but useless effort with no expectation that he will accomplish what his correspondence of a year and a half failed to do.

It requires no citation of cases to prove that the elementary principium that the law does not require

one to do a useless thing is applicable here. Since the law does not so require plaintiff to proceed, it is submitted that equity will give him the same consideration.

Plaintiff further submits that his complaint stated a cause of action with the refund demand because of the common law right that was upheld in *Sirian Lamp Co. v. Manning*, 123 F. 2d 776, 138 A.L.R. 1423.

In the *Sirian Lamp Co.* case it was held that the taxpayer's right to sue the collector for refund for taxes illegally assessed or collected, is a common law right against the collector personally, and is not derived from Section 3772 of the Internal Revenue Code of 1954. That Section merely requires a preliminary appeal to the commissioner as a condition precedent to the enforcement to his common law liability.

In the instant case, plaintiff made more than one appeal to the commissioner, all of which were unsuccessful and, therefore, the condition precedent was complied with and he may proceed in reliance on the court's equity jurisdiction.

Section 3772 makes it obvious that the purpose is to afford the Treasury Department an opportunity to consider the taxpayer's claim and make a refund or provide for an administrative settlement before resorting to the courts. Plaintiff afforded many an opportunity to the Treasury Department, since he asked the commissioner repeatedly not to proceed forcibly to collect the taxes involved. The giving of such opportunity to correct the error is the sole purpose of

the refund Section 3772. See *Murphy v. United States*, 78 F. Supp. 236; *Carmack v. Scofield*, 201 Fed. 2d 360; *Reeves v. Wise*, 119 Fed. 2d 472, cert. den. 62 S.Ct. 181; *Hanna Iron Ore v. United States*, 68 F. Supp. 832.

CONCLUSION.

The order of the Trial Court of March 18, 1957, as we have shown in our Opening Brief and as we have shown in the present Reply Brief, is contrary to the Constitutional concept involved in the issues here and, therefore, it was entered in error. The order of March 18, 1957 ought to be reversed by this Honorable Court.

Dated, Carmel, California,
November 7, 1957.

Respectfully submitted,

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No. 15595

**United States
Court of Appeals
FOR THE NINTH CIRCUIT**

GUS LA VERN HILLER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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INDEX

	Page
I. STATEMENT OF JURISDICTION.....	1
II. SUMMARY OF ARGUMENT.....	3
III. ARGUMENT	5
IV. CONCLUSION	10

TABLE OF CASES

<i>Bell v. United States</i> , 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955).....	5, 6, 7, 8
<i>Halverson v. United States</i> , 162 F. 2d 308 (9 Cir. 1947)...	10
<i>Hiller v. United States</i> , 218 F. 2d 641 (9 Cir. 1954).....	3
<i>Morgan v. Devine</i> , 237 U.S. 632, 35 St.Ct. 712, 59 L.Ed. 1153 (1915)	10
<i>O'Brien v. Squier</i> , 133 F. 2d 123 (9 Cir. 1943).....	10
<i>United States v. Henry Lobrey Co., et al.</i> , 112 F. Supp. 69 (D.C. W.D. Pa. 1953).....	10
<i>United States v. Saladonis</i> , 93 F. 2d 302 (2 Cir. 1937)....	9
<i>United States v. Universal Corporation</i> , 344 U.S. 218, 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952).....	5

STATUTES

18 U.S.C. 2421.....	5, 6, 7
18 U.S.C. 2422.....	1, 4, 6, 7, 8, 10
18 U.S.C. 3231	2
18 U.S.C. 3237	2
28 U.S.C. 2253	3

<i>ii</i>	STATUTES (<i>Continued</i>)	Page
28 U.S.C. 2255.....		2, 3, 11
29 U.S.C. 215		5
29 U.S.C. 216(a)		5

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 18	2
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**United States
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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF OF APPELLEE

I.

STATEMENT OF JURISDICTION

Appellant, Gus La Vern Hiller, was indicted in the Western District of Washington, Northern Division, for fifteen alleged violations of Title 18, United States Code, Section 2422. He pleaded guilty to two offenses which were separately charged in Counts IV

and IX of the Indictment. The judgment of conviction directed that he receive consecutive sentences. The present appeal is from a denial of appellant's motion under Title 28, United States Code, Section 2255, for an order vacating the sentence on the second charge. He asserts that there was only one crime and should be but one punishment.

Count IV of the Indictment charged that defendant induced a woman to go from the Northern Division of the Western District of Washington to Dillon, Montana, to engage in the practice of prostitution and thereby caused her to be transported upon the lines of a common carrier in interstate commerce. Count IX made a substantially identical charge with the distinction that a different female was involved and such other person was transported to Nyssa, Oregon.

The District Court of the United States for the Western District of Washington, Northern Division, had jurisdiction of the offenses pursuant to the provisions of Title 18, United States Code, Section 3231. Venue was properly laid in that District Court under the provisions of Rule 18 of the Federal Rules of Criminal Procedure and of Title 18, United States Code, Section 3237.

The jurisdiction of this Court to review the denial of appellant's motion under Title 28, United States Code, Section 2255, is established by the provisions of that section and of Section 2253 of the same title.

There is no printed record on this appeal. The Indictment is paper numbered "1" in the record transmitted to this Court by the Clerk of the District Court and the motion is paper numbered "14" in that record.

II.

SUMMARY OF ARGUMENT

Appellant raises two issues on this appeal (pages 4 - 5 of appellant's brief). Both may be summarized by saying that appellant claims that Counts IV and IX of the Indictment charged the same offense, and the consecutive sentence imposed on the latter count was therefore illegal.

A good part of his argument consists of restatement of matters which he had previously urged upon this Court in other attempts to avoid punishment for the offense charged in Count IX of the Indictment. (See: *Hiller v. United States*, 218 F. 2d 641 (1954), the order of this Court filed August 27, 1956 in Miscellaneous No. 403 and the papers filed by appellant in connection with the applications decided by that decision and by that order.)

Appellant's argument that he is guilty of only one offense is premised upon conclusions that a violation of Title 18, United States Code, Section 2422, consists of a course of conduct in persuading one or more women to travel on the lines of common carriers for purposes of prostitution and that actual use of the transportation facilities by the victims is not essential to the crime. Since those basic conclusions are unsound this appeal need not be argued at great length.

Appellant concedes that the women so persuaded by him traveled on separate common carriers to different states but argues that such distinct uses of interstate transportation facilities are immaterial since his crime was a course of conduct of persuading two women at one time and place.

Appellee takes the position that persuading two women to go to separate states, by different common carriers, for the purpose of prostitution, constitutes two crimes rather than one, even if both women are persuaded at one time and place. The separate use by each woman of the facilities of common carriers in interstate commerce was a necessary part of each crime. It is the acts of improper use of such facilities which are made punishable by the statute. The White Slave Traffic Act does not prohibit or fix a punishment for a course of conduct.

III.

ARGUMENT

Appellant places great stress upon the decisions of the Supreme Court in *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955), and *United States v. Universal Corporation*, 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952). He attempts to equate the factual situation in his case with the circumstances considered by the Supreme Court in those cases.

The latter case involved alleged violations of the Fair Labor Standards Act, Title 29, United States Code, Sections 215 and 216(a). The Supreme Court held that those statutes fixed courses of conduct, rather than individual acts, as the units of prosecution.

The *Bell* case also involved the unit of criminal prosecution, but course of conduct was not found to be such a unit. The Court ruled that Title 18, United States Code, Section 2421, did not require or permit more than one punishment for the single act of driving an automobile across a state line, without regard to the number of women who might be in the car when it passed from one state to another.

Appellant contends that *Bell*, like *Universal Corporation*, shows that punishment should be for course of conduct as distinguished from individual acts and

that the law applied to his case should be the same. But course of conduct was not involved in the *Bell* case and is not a factor in the instant case. The Supreme Court held that Bell's act constituted a single transaction in interstate commerce. It did not decide that the White Slave Traffic Act, or any section of it, referred to the course of conduct of an offender. Its ruling was that Bell had been guilty of one infraction of Title 18, United States Code, Section 2421, in making a single trip in interstate commerce with a car containing more than one woman who was being transported for purposes of prostitution. That was a single transaction in interstate commerce. Each such transaction, rather than some vague course of conduct, is the proper unit of prosecution.

In the present case, as in *Bell*, acts, rather than courses of conduct, are to be considered in determining how many separate crimes have been committed. Congress did not have authority to govern the conduct of persons who engaged in the white slave traffic within the boundaries of a sovereign state. It did not attempt such control in enacting Title 18, United States Code, Sections 2421 and 2422. Without regard to the social purpose of the white slave laws, Congress had power under the Constitution to regulate interstate commerce; but not to restrain immorality within any state. It therefore properly withdrew the facili-

ties of interstate commerce from those engaged in the white slave traffic without attempting to impose a moral code upon persons who did not use interstate commerce for their activities.

Title 18, United States Code, Section 2421, the first section of the White Slave Traffic Act, prohibits the transportation of women in interstate commerce for immoral purposes. *Bell* violated the provisions of that section by driving a car across a state line with two women passengers who were being carried to a place where they would engage in prostitution. The Court held that there was only one illegal transaction — the single crossing of the boundary.

The next section of the Act, Title 18, United States Code, Section 2422, makes it a crime to cause a woman to travel on the lines of common carriers in interstate commerce by persuasion, inducement, enticement or coercion. Appellant in this case was convicted of causing two distinct journeys in violation of that statute by persuading two women to make separate trips to different states. One woman was caused to go from the Northern Division of the Western District of Washington to a point in Oregon. The other was caused to travel from the same starting point to a place in Montana. Each woman made a trip which was entirely distinct from that made by the other. As

each entered upon her journey on a common carrier in interstate commerce, the appellant became guilty of a crime which had not been committed until that trip began.

The persuasion, no matter how successful it may have been, did not constitute any violation of Title 18, United States Code, Section 2422, until it caused transportation of a woman as a passenger upon the line or route of a common carrier in interstate or foreign commerce. The statutory language is clear and not subject to interpretation. Title 18, United States Code, Section 2422, provides first for the persuasion, inducement, enticement or coercion, then goes on to say, "and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce * * *."

If the women named in Counts IV and IX of the Indictment had been effectively persuaded by appellant but were prevented from reaching the lines of the common carriers by death, accident or other factor completely beyond their control, appellant would not have been guilty of any violation of Title 18, United States Code, Section 2422.

"The constitutional basis of the statute is the withdrawal of 'the facility of interstate transportation,' *Hoke v. United States*, 227 U.S. 308, 322,

though, to be sure, the power was exercised in aid of social morality." *Bell v. United States*, 349 U.S. 81, 83.

Appellant argues that *United States v. Salidonas*, 93 F. 2d 302 (2 Cir. 1937), is authority to the contrary. He sets forth what purports to be a quotation from that case at page 11 of his brief. That alleged quotation tends to support his theory that the persuading, in and of itself, makes out the crime. The decision of the Court of Appeals in the *Salidonas* case does not appear to contain the words of the alleged quotation appearing at page 11 of appellant's brief. Somewhat similar language of radically different import appears at page 304 of the decision where the Court held:

"The inducement sets in motion the successive acts that constitute the crime. It is unnecessary to show control of the medium of transportation by the inducer. It is sufficient if the accused knows or should have known that interstate transportation by common carrier would reasonably result *and if it does.*" (Emphasis ours.)

Since there can be no crime of inducing a woman to travel on the lines of a common carrier for the purpose of prostitution unless such travel in fact occurs, the proof necessary to support the charge in either Count IV or IX of the Indictment would not justify conviction of the other. Each woman made

a separate trip to a different state and proof of one trip would not show the other. It therefore follows that each count alleged a different crime.

Morgan v. Devine, 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153 (1915);

O'Brien v. Squier, 133 F. 2d 123 (9 Cir. 1943);

Halverson v. United States, 162 F. 2d 308 (9 Cir. 1947);

United States v. Henry Lohrey Co., et al., 112 F. Supp. 69 (D.C. W.D. Pa. 1953).

IV.

CONCLUSION

Appellant has pleaded guilty to charges of causing different women to be transported as passengers upon the lines and routes of common carriers in interstate commerce as the result of his knowing, willful and unlawful persuasion, inducement and enticement. Each of the two crimes was committed when the transportation occurred, and not before. That transportation was on different lines and terminated in different states. The crimes were separate and distinct. Proof sufficient to sustain one charge would not, standing alone, justify conviction on the other. Each constituted a separate violation of Title 18, United States Code, Section 2422, which provides punishment for certain unlawful acts in interstate commerce

rather than for any course of conduct of a person engaged in the white slave traffic.

It is therefore respectfully urged that the action of the Court below in denying appellant's motion under Title 28, United States Code, Section 2255, was entirely proper and should be affirmed in all respects.

Respectfully submitted,

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No. 15598
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ALBERT VITA SCIAMA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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TOPICAL INDEX

	PAGE
Jurisdiction of the court.....	1
Statement of the case.....	1
Issues presented	3
Argument	5

I.

Appellant's application for adjustment of status under Section 4 of the Displaced Persons Act of 1948 [62 Stat. 1009, 50 App. U. S. C. A. 1953] was properly denied because appellant had not "lawfully entered the United States as a non-immigrant"	5
---	---

II.

The appointment, qualification and assignment of special inquiry officers of the Immigration and Naturalization Service holding deportation hearings are excepted from the requirement of the provisions of Section 11, Administrative Procedures Act. [Act of June 11, 1946, 60 Stat. 244, 5 U. S. C. A. 1010]	9
Conclusion	10

TABLE OF AUTHORITIES CITED

CASES	PAGE
Chow's Petition, In re, 146 Fed. Supp. 487.....	6
Couto v. Shaughnessy, 218 F. 2d 758; cert. den., 349 U. S. 952, 75 S. Ct. 879, 99 L. Ed. 1276.....	9
Federal Crop Insurance Corporation v. Merrill, 323 U. S. 380....	8
Lee v. Munroe, 7 Cranch (11 U. S. 366).....	8
Lukman v. Holland, 149 Fed. Supp. 312.....	6
Marcello v. Ahrens, 212 F. 2d 830.....	9
Marcello v. Bonds, 349 U. S. 302, 75 S. Ct. 757, 90 L. Ed. 1107	10
Ocon v. Albert Del Guercio, 237 F. 2d 177.....	9
Sleddens v. Shaughnessy, 177 F. 2d 363.....	5, 6
Tsiminois v. Holland, 228 F. 2d 907.....	10
United States ex rel. Feretic v. Shaughnessy, 221 F. 2d 262....	5, 7
United States v. Stewart, 311 U. S. 60.....	8
Utah Power and Light Company v. United States, 243 U. S. 389	8
Whiteside v. United States, 93 U. S. 247.....	8
Wilbur National Bank v. United States, 294 U. S. 120.....	8

STATUTES	
Act of June 11, 1946 (60 Stat. 244)	3, 9
Administrative Procedure Act, Sec. 7(a).....	9
Administrative Procedure Act, Sec. 11	3, 9
Displaced Persons Act of 1948, Sec. 4	2, 3, 6, 7
Immigration Act of May 26, 1924, Sec. 3	4, 6
Nationality Act of 1924, Sec. 14.....	2
Nationality Act of 1924, Sec. 15.....	2
43 Statutes at Large, p. 154.....	4
60 Statutes at Large, p. 241.....	9
62 Statutes at Large, p. 1009.....	3
United States Code, Title 8, Sec. 214.....	2
United States Code, Title 8, Sec. 215.....	2
United States Code Annotated, Title 8, Sec. 203.....	4
United States Code Annotated, Title 5, Sec. 1006(b).....	9
United States Code Annotated, Title 8, Sec. 1010	3, 9
United States Code Annotated (App.), Title 50, Sec. 1953.....	3

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Appellee.

APPELLEE'S BRIEF.

Jurisdiction of the Court.

Appellee adopts the statement of the appellant concerning jurisdiction.

Statement of the Case.

Plaintiff is an alien, native of Egypt, a citizen of Italy and last entered the United States on January 26, 1956 at Tacoma, Washington, at which time he was admitted as a temporary visitor for six months.

The temporary visit of the plaintiff was last extended until September 15, 1947 and on November 30, 1947 plaintiff was notified that his application for a further extension of stay as a temporary visitor had been denied and that it was incumbent upon him to depart from the United States within two weeks of that date. Because of the introduction of a private bill in Congress the Immigration and Naturalization Service took no further action.

On October 1, 1948, Appellant filed application to adjust his immigration status under the Displaced Persons Act of 1948. He was accorded a hearing on that application at Los Angeles, California on October 24, 1949 and November 18, 1949; under date of November 22, 1949, the Examining Officer recommended that the application be denied because appellant at that time was not displaced either from the country of his birth, nationality or last residence and for the further reason that he could return to any of such countries at that time without fear of persecution. No action was taken on that decision.

Under date of April 30, 1954 the proceedings under Section 4 of the Displaced Persons' Act of 1948 were ordered reopened. A further examination was accorded appellant under that application relating to adjustment of status at Los Angeles, California on May 2, 1955. The application was denied on June 15, 1955 by the Regional Commissioner of the Southwest Region. The ground for said denial was that appellant had not entered the United States in 1946 as a temporary visitor.

Appellant was thereafter served with a Warrant of Arrest. A hearing in deportation was held on June 29, 1955, at which special inquiry officer was John D. Bartos. The appellant was held to be deportable under Sections 14 and 15 of the Nationality Act of 1924 [8 U. S. C. 214, 215 (1940 ed.)] in that he was an alien who at any time after entering the United States is found to have remained therein for a longer time than permitted under the statute and regulations. The Board of Immigration's Appeal dismissed an appeal on said order on January 31, 1956 and denied a Motion for Stay on March 30, 1956. On May 9, 1956 a Warrant of Deportation was issued.

The within action was filed on May 29, 1956 and was a Complaint for Judicial review and injunction. On March

25, 1956 trial was had before the Honorable Wm. M. Byrne, United States District Judge for the Southern District of California after which on May 2, 1957 said Honorable Wm. M. Byrne rendered decision in favor of defendant.

From said decision the within appeal was taken.

Issues Presented.

1. When appellant first entered the United States on January 26, 1946 at Tacoma, Washington had he "lawfully entered the United States as a non-immigrant" under Section 4 of the Displaced Persons Act of 1948 [50 App. U. S. C. A. 1953, 62 Stat. 1009]?

Although appellant does not raise the issue properly, appellant at page 4 of his opening brief as part of his assertions of fact attacks the validity of the deportation hearing as being held in contravention of "laws thereunto appertaining". The only law "thereunto appertaining" would be Section 11 of the Administrative Procedure Act [Act of June 11, 1946, 60 Stat. 244, 8 U. S. C. A. 1010]. Accordingly the following issue is deemed raised:

2. Whether the appointment, qualifications and assignment of special inquiry officers conducting deportation hearings are excepted from the requirements of Section 11 of the Administrative Procedure Act. [Act of June 11, 1946, 60 Stat. 244, 5 U. S. C. A. 1010]?

Statutes Involved.

Section 4 of the Displaced Persons Act of 1948, 62 Stat. 1009, 50 App. U. S. C. A. 1953, provides:

"(a) Any alien who (1) entered the United States prior to April 30, 1949 and was on that date in the United States or if he was temporarily absent from

the United States on that date for reasons which in accordance with regulations to be promulgated by the Attorney General, shows special circumstances justifying such absence, and (2) is otherwise admissible under the immigration laws, and (3) is a displaced person residing in the United States as defined in this section may, within two years next following the effective date of this Act, as amended, apply to the Attorney General for an adjustment of his immigration status . . .

“(b) When used in this section the term ‘Displaced Person residing in the United States’ means a person who establishes that he lawfully entered the United States as a non-immigrant under section 3 or as a non-quota immigrant student under subdivision (e) of Section 4 of the Immigration Act of May 26, 1924, as amended, and that he is a person displaced from the country of his birth, or nationality, or of his last residence as a result of events subsequent to the outbreak of World War II; and that he cannot return to any of such countries because of persecution or fear of persecution on account of race, religion or political opinions.”

Section 3 of the Immigration Act of May 26, 1924, as amended, 8 U. S. C. A. 203, 43 Stat. 154 provides:

“When used in this chapter the term ‘Immigrant’ means any alien departing from any place outside the United States destined for the United States, except (1) an accredited official of a foreign government recognized by the Government of the United States, . . . (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure”

ARGUMENT.

I.

Appellant's Application for Adjustment of Status Under Section 4 of the Displaced Persons Act of 1948 [62 Stat. 1009, 50 App. U. S. C. A. 1953] Was Properly Denied Because Appellant Had Not "Lawfully Entered the United States as a Non-immigrant".

Appellant admits the following facts: That he entered the United States on January 1946 as a temporary visitor; that at that time it was his intention to remain in the United States permanently; he alleges that he entered as a visitor only because the American Consul in Shanghai did not have a supply of immigrant visas available and because he was advised he could obtain an immigrant visa at Tijuana, Baja California, Mexico.

The only evidence in the record that the American Consul in Shanghai made the above representations came from the bare assertions of the appellant and cannot be deemed established; however, the above facts will be assumed, for the purpose of argument.

A.

It is well settled that where an alien enters the United States as a temporary visitor and at the time of entry intends to remain permanently, his subjective intent governs and he is deemed not to have entered the United States lawfully.

Sleddens v. Shaughnessy (2 Cir. 1949), 177 F. 2d 363;

United States ex rel. Feretic v. Shaughnessy (2 Cir. 1955), 221 F. 2d 262;

In re Chow's Petition (S. D. N. Y. 1956), 146 Fed. Supp. 487;

Lukman v. Holland (E. D. Pa. 1957), 149 Fed. Supp. 312.

Section 4(b) of the Displaced Persons Act of 1948 (*supra*) requires that in order to qualify for adjustment of status under Section 4, the applicant must have "lawfully entered the United States as a non-immigrant under Section 3 of the Immigration Act of May 26, 1924".

Section 3 of the Immigration Act of May 26, 1924 (*supra*) provides that a non-immigrant is, among other things, "(2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure."

It is easily seen, then, that appellant having intended to remain permanently at the time of entry could not have entered lawfully as a "non-immigrant", as is required by Section 4(b) of the Displaced Persons Act of 1948 (*supra*).

In *Sleddens v. Shaughnessy* (*supra*) the Court made the following pertinent statement at page 364:

"The relator first applied for an Immigration visa. He was told, in substance, that there was such an accumulation of applications for immigration visas that he could not obtain one inside of three or four years. He sought to come to America to establish a business of selling Dutch flower bulbs, Holland gin and other articles. He said that his intention when given a visitor's permit, was to remain in America permanently, if possible. He so

testified before the Immigration authorities. He brought his family with him and made no showing that he retained a domicile in Holland or had any intention of returning. Under these circumstances we think the finding that he came as an immigrant without a visa was justified."

In *United States ex rel. Feretic v. Shaughnessy* (*supra*), the court, in deciding a case under the very same statute in question here (Section 4 of the Displaced Persons Act of 1948), held that an alien seaman admitted as such, who, at the time of entry into the United States intended to remain permanently in the United States had not entered lawfully as a "bona fide non-immigrant". At page 264 the Court made the following statement:

"The last entry of relator into the United States prior to the filing of his 1949 Petition was on December 24, 1944, in the Port of San Pedro, California, as a member of the crew of the S.S. Caleroy, at which time he was admitted as a non-immigrant under the provisions of Section 3(5) of the Immigration Act of 1924. His papers were in order as a 'bona fide alien seaman' temporarily here and with the intention of departing at or before the expiration of his leave on the same or some other vessel. In reality, however, his own unequivocal testimony compelled the finding that when he left the ship he intended to stay here permanently, if he could. Under these circumstances, we have no doubt that his entry was illegal. In effect he perpetrated a fraud upon the immigration authorities when he induced them to let him off the ship on the basis of the usual papers presented by bona fide alien seaman; and he was not a 'bona fide non-immigrant'. No amount of sympathy for an alien who wishes to disassociate him-

self from a Communistic regime from the country of his birth can furnish justification or excuse for disregarding the plain mandate of the statute."

B.

Appellant also contends that because the Consular officials at Shanghai represented that appellant could obtain an immigrant visa "easily" at Tijuana, Mexico after arrival in the United States and because the Consul at Shanghai did not have a supply of proper immigration forms, that the appellant's otherwise unlawful entry is rendered lawful.

The law is to the contrary and well settled. The United States is neither bound nor estopped by the Act or arrangements of its officers or agents to do or cause to be done what the law does not sanction or permit.

Federal Crop Insurance Corporation v. Merrill,
323 U. S. 380 (1947);

United States v. Stewart, 311 U. S. 60, 70 (1940);

Wilbur National Bank v. United States, 294 U.
S. 120, 123 (1935);

Utah Power and Light Company v. United States,
243 U. S. 389 (1917);

Whiteside v. United States, 93 U. S. 247 (1876);

Lee v. Munroe, 7 Cranch (11 U. S. 366) (1813).

II.

The Appointment, Qualification and Assignment of Special Inquiry Officers of the Immigration and Naturalization Service Holding Deportation Hearings Are Excepted From the Requirement of the Provisions of Section 11, Administrative Procedures Act. [Act of June 11, 1946, 60 Stat. 244, 5 U. S. C. A. 1010.]

At page 4 of the Appellant's Opening Brief and the Statement of Facts, appellant alleges that the deportation hearing conducted by John D. Bartos, Special Inquiry Officer, of the Immigration and Naturalization Service, was invalid because in violation of "laws thereunto appertaining".

The appellant has raised the issue improperly and ambiguously. The law "thereunto appertaining" is Section 11 of the Administrative Procedure Act (*supra*). Once in doubt, it has since been resolved. The Courts now uniformly hold that Section 11 of the Administrative Procedure Act has no application to special inquiry officers of the Immigration and Naturalization Service who hold deportation hearings. The rationale of the decisions is that §7(a) of the Administrative Procedure Act [60 Stat. 241, 5 U. S. C. A. 1006(b)] excepts from its terms "officers specially provided for by or designated pursuant to statute".

Ocon v. Albert Del Guercio (9 Cir. 1956), 237 F. 2d 177, 179;

Couto v. Shaughnessy (2d Cir. 1955), 218 F. 2d 758, 759, cert. den. 349 U. S. 952, 75 S. Ct. 879, 99 L. Ed. 1276;

Marcello v. Ahrens (5th Cir.), 212 F. 2d 830, 836;

Tsiminois v. Holland (3d Cir.), 228 F. 2d 907, 908;

Marcello v. Bonds (1955), 349 U. S. 302, 305, 75 S. Ct. 757, 759, 99 L. Ed. 1107.

In *Marcello v. Bonds* (*supra*), the court stated at page 305:

“Petitioner concedes that §242(b) of the Immigration Act, authorizing the appointment of a ‘Special Inquiry Officer’ to preside at the deportation proceedings, does not conflict with the Administrative Procedure Act, since §7(a) of that Act excepts from its terms officers specially provided for or designated pursuant to other statutes”

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the decision of the District Court rendering judgment in favor of the Appellee, Albert Del Guercio, District Director of Immigration and Naturalization Service at Los Angeles, should be affirmed.

Respectfully submitted,

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